Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN CONSORTI & FRANCES CONSORTI,

Petitioners,

—v.—

OWENS-CORNING FIBERGLAS CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where this Court has already granted certiorari in the case of *Gasperini v. The Center for Humanities, Inc.*, 66 F.3d 427 (2d Cir. 1995), *cert. granted*, No. 95-719, ___ S.Ct. ___, 1996 WL 18430, 64 USLW 3349 (U.S., Jan. 19, 1996), on the identical issue, should this Court not grant certiorari in the present case?

2. Did the Second Circuit err by applying a state and not federal standard of appellate review to determine whether a jury award in a diversity action was excessive, in direct conflict with this Court's decisions in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), and *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977)?

3. In this asbestos-related diversity action involving the jury's award of damages for Mr. Consorti's torturous and unremitting pain and suffering from mesothelioma over a 32-month period, upheld by the District Court, did the Second Circuit err by applying a state standard, and not the federal standard, of appellate review to determine whether the jury's award was excessive, in direct conflict with its own prior holdings, as well as the holdings of other circuits?

4. Does the Seventh Amendment permit a federal appellate court to overturn a jury award as excessive, particularly where the trial judge considered and rejected a post-trial claim of excessiveness under Fed. R. Civ. P. 59?

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are set forth in the caption on the cover of this petition.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
CONTENTS OF THE APPENDIX	v
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Introduction	2
B. Factual Background and Trial Proceedings	6
C. The Second Circuit's Decision	7
REASONS FOR GRANTING THE WRIT	10

PAGE

I. THE SECOND CIRCUIT'S APPLICATION OF A STATE STANDARD FOR APPELLATE REVIEW OF A FEDERAL JURY VERDICT CONFLICTS DIRECTLY WITH THE DECISIONS OF THIS COURT 10

II. THE SECOND CIRCUIT'S APPLICATION OF A STATE STANDARD OF APPELLATE REVIEW DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS .. 13

III. THE SECOND CIRCUIT'S DECISION RAISES THE IMPORTANT, UNDECIDED QUESTION OF WHETHER THE SEVENTH AMENDMENT PERMITS AN APPELLATE COURT TO REVIEW A JURY AWARD FOR EXCESSIVENESS 16

CONCLUSION 20

PAGE

CONTENTS OF THE APPENDIX

Appendix A—Amended Opinion of the United States Court of Appeals for the Second Circuit Dated and Entered December 22, 1995 ..... 1a

Appendix B—Original Opinion of the United States Court of Appeals for the Second Circuit Dated and Entered August 28, 1995 ..... 33a

Appendix C—Judgment of the United States Court of Appeals for the Second Circuit Filed December 22, 1995 ..... 60a

Appendix D—Decision of the United States District Court for the Southern District of New York Dated January 21, 1994 ..... 63a

Appendix E—Order of the United States Court of Appeals for the Second Circuit Denying Rehearing Filed January 29, 1996 ..... 157a

Appendix F—Opinion of the United States Court of Appeals for the Second Circuit in *Gasperini* Dated and Entered September 12, 1995 ..... 159a

TABLE OF AUTHORITIES

Cases: PAGE

A. & G. Stevedores v. Ellerman Lines, 369 U.S. 355 (1962) 11

Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963 (7th Cir. 1973) 15

Baker v. Dillon, 389 F.2d 57 (4th Cir. 1968)..... 19

Blasky v. Wheatley Trucking, Inc., 482 F.2d 497 (6th Cir. 1973) 13

Boem v. American Broadcasting Co., Inc., 929 F.2d 482 (9th Cir. 1991)..... 19

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) .....i, 4, 9, 10, 11, 15, 16, 19

Donovan v. Penn Shipping Co., 429 U.S. 648 (1977) .....i, 4, 9, 10, 11, 15

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 5, 19

Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474 (1933) 17

Gasperini v. The Center for Humanities, Inc., 66 F.3d 427 (2d Cir. 1995), *cert. granted*, No. 95-719, ___ S.Ct. ___, 1996 WL 18430, 64 USLW 3349 (U.S., Jan. 19, 1996) .....i, 1, 2, 3, 4, 5, 6, 10, 16, 20

Grunenthal v. Long Island R. Co., 393 U.S. 156 (1968).....17, 18

Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co., 284 U.S. 151 (1931) 11

PAGE

Hysell v. Iowa Public Service Co., 559 F.2d 468 (8th Cir. 1977) 15

In re Air Crash Disaster Near New Orleans, La., 764 F.2d 1084 (5th Cir. 1985) 14, 19

Karlson v. 305 East 43rd Street Corp., 370 F.2d 467 (2d Cir.), *cert. denied*, 387 U.S. 905 (1967)..... 10

Lakin v. Daniel Marr & Son, 732 F.2d 233 (1st Cir. 1984) 13

Laubach v. Khajawai, No. 94-2421, 1995 WL 508879 (4th Cir. Aug. 29, 1995) 13

Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152 (10th Cir. 1981)..... 14

Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) 9

Mayer v. Gary Partners & Co. Ltd., 29 F.3d 330 (7th Cir. 1994) 9, 13, 15

Metropolitan R. Co. v. Moore, 121 U.S. 558 (1887)... 17

Neese v. Southern R. Co., 350 U.S. 77 (1955) 17

Norton v. Caremark, Inc., 20 F.3d 330 (8th Cir. 1994) 18

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).. 12

Peco Energy Co. v. Boden, 64 F.3d 852 (3d Cir. 1995) 14

Pernell v. Southall Realty, 416 U.S. 363 (1974)..... 13

Petrowski v. Southworth Products, 15 F.3d 748 (8th Cir. 1994) 14, 15

Roboserve, Ltd. v. Tom's Foods, Inc., 940 F.2d 1441 (11th Cir. 1991) 14

PAGE

Roggow v. Uincral Processing, 894 F.2d 246 (7th Cir. 1990) 15

Southern Ry.-Carolina Div. v. Bennett, 233 U.S. 80 (1914) 17

The Post Office v. Portec, Inc., 913 F.2d 802 (10th Cir. 1990), *vacated and remanded*, 499 U.S. 915 (1991), *appeal dismissed per stipulation*, 935 F.2d 1105 (10th Cir. 1991) 9

United States v. Laub, 37 U.S. (12 Pet.) (1838) 17

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 17

Vanskike v. Union Pacific Railroad, 725 F.2d 1146 (8th Cir. 1984) 15

Wilkerson v. McCarthy, 336 U.S. 53 (1949) 13

Statutes and Rules:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 1332 1

Fed. R. Civ. P. 59 ..... i, 11

N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995) 5, 8, 12, 19

Sup. Ct. R. 10.1(a) & (c) 3, 5, 6, 13

Other Authorities:

11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2818 (2d ed. 1995) 4, 16, 18, 19

PAGE

David Siegel, Practice Commentary, N.Y. Civ. Prac. L. & R. § 5501 (McKinney 1995)..... 12

Eric Schnapper, Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts, 1989 Wis. L. Rev. 237 .....4, 19

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit dated and entered on December 22, 1995.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is scheduled to be published at ___ F.3d ___ (2d Cir. 1995), and is unofficially reported at 1995 WL 760994 (2d Cir. Dec. 22, 1995) (*amending* 64 F.3d 781 (2d Cir. 1995) (withdrawn)). The decision is reprinted in full in the Appendix hereto at 1a-32a. The Second Circuit's judgment is unpublished, and is reprinted in the Appendix hereto at 60a-62a. The Second Circuit's original withdrawn Opinion is reprinted in full in the Appendix hereto at 33a-59a. The District Court's decision appealed from is published at 847 F. Supp. 1086 (S.D.N.Y. 1994), and is reprinted in the Appendix hereto at 63a-156a. The Second Circuit's Order denying the Consortis' petition for rehearing, entered January 29, 1996, is reprinted in the Appendix hereto at 157a-158a. The Second Circuit's decision in the case of *Gasperini v. The Center for Humanities, Inc.*, published at 66 F.3d 427 (2d Cir. 1995), is reprinted in the Appendix hereto at 159a-169a.

JURISDICTION

Petitioners seek review of the Opinion of the United States Court of Appeals for the Second Circuit and its judgment of December 22, 1995. By that judgment the Second Circuit overturned the jury verdict and conditionally ordered a remittitur [32a]. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1332; the jurisdiction of the Court of

Appeals was invoked under 28 U.S.C. § 1291; the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

STATEMENT OF THE CASE

A. Introduction

The principal issue presented by this petition is whether the Second Circuit erred in rejecting the federal standard, and in applying a state standard, to determine whether the jury's award in this diversity action was excessive. This Court has already deemed this very issue worthy of its review. Indeed, in the case of *Gasperini v. The Center for Humanities, Inc.*, 66 F.3d 427 (2d Cir. 1995) [159a-169a], this Court has just recently granted certiorari on this very issue, No. 95-719, ___ S.Ct. ___, 1996 WL 18430, 64 USLW 3349 (U.S., Jan. 19, 1996), and has resolved to decide (1) whether the federal "shock the conscience" standard must be applied by federal courts of appeals reviewing issues of excessiveness, and (2) whether, under any circumstance, the Seventh Amendment precludes a federal appellate court from overturning a jury award as excessive.

While certiorari has already been granted in *Gasperini*, the instant case is *a fortiori* worthy of this Court's review. Indeed,

in deciding *Gasperini*, the Second Circuit fully relied upon and deemed itself bound by its original ruling in the instant case [166a, 168a].[1] Thus, this is the case in which the Second Circuit formulated its erroneous rule that a federal appeals court should apply the state standard in reviewing a jury's verdict.

Moreover, the Second Circuit has clearly implied in this case that application of the federal standard would have resulted in a different outcome, and a "higher award," because application of the federal "shock the conscience" standard would be more deferential to the jury's verdict [27a n.14]. Thus, the choice of whether the federal or state standard must apply in reviewing the damages award is certainly not an acadamic exercise in this case, but materially affects the plaintiffs' right to compensation for the extreme pain and suffering endured by Mr. Consorti.

It is further clear that, as is true in *Gasperini*, the present case merits this Court's review pursuant to Supreme Court Rule 10.1. In this respect, there are "special and important reasons" for this Court to grant certiorari here because the Second Circuit "has rendered a decision in conflict with the decision[s] of [ ]other United States court[s] of appeals on the same matter"; Sup. Ct. R. 10.1(a); and has decided a question directly impacting upon Seventh Amendment concerns "in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10.1(c).[2]

As implicitly shown by this Court's grant of certiorari in *Gasperini*, the issue of which standard of review a federal

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[1] It should be noted that the petitioners in *Gasperini* sought certiorari prior to the instant petitioners because, in this case, Mrs. Consorti unsuccessfully petitioned the Second Circuit for rehearing [157a-158a].

[2] Moreover, because this case raises the same issues raised in *Gasperini*, and because this Court has already determined that it will hear *Gasperini*, it is evident that granting certiorari in this case will not further burden this Court.

court of appeals should apply to scrutinize a jury's verdict, or whether the Seventh Amendment even allows such a review, is of tremendous importance. A leading commentator has observed:

> There are few subjects in the entire field of procedure that have been subject to so much change and controversy in recent years as the proper scope of review of an order granting or denying a motion for a new trial.

11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2818, at 194 (2d ed. 1995) ["Wright, Miller & Kane"].

As an increasing number of federal appellate courts overturn jury verdicts as excessive, *see* Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 238, 313 ["Schnapper"], the Second Circuit's decision in this case provides a stark example of the threat posed to the Seventh Amendment when a federal court of appeals departs from clear Supreme Court precedent and substitutes its judgment for that of the jury.

In its decision, the Second Circuit disavowed this Court's holdings in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989), that federal law controls "on those issues involving the proper review of the jury award by a federal district court and court of appeals," and *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977), that "[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a question of federal law . . . ."

Instead, the Second Circuit applied a far more invasive state standard, which the Court acknowledged to be "less deferential to the jury's verdict than the federal standard . . ." [18a]. Recognizing that the application of state law "to questions of remittitur has caused considerable confusion" [19a], and that many federal courts apply federal law when review-

ing issues of excessiveness [20a n.8; 21a-22a n.9], the Second Circuit deemed itself bound to follow state law in this diversity action because "[t]o disregard New York law in this case, in favor of the federal 'shocks the conscience' standard, would violate the fundamental constitutional doctrine of *Erie* [*R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)]" [20a].

As in *Gasperini*, the Second Circuit in the present case concluded that there were no trial errors, and that the jury deliberations had been fair and impartial. Indeed, the Second Circuit held that the District Court had "insured that plaintiffs and defendants received a trial by jury that fairly addressed the individual claims" [13a], and that the trial judge's administration of this action had resulted in "a fairer, more rational and evenhanded delivery of justice" [8a].

Nonetheless, the Second Circuit overturned the jury's award of damages. In so doing, the Court conducted a *de novo* review of the facts and issued a conditional remittitur of the jury's award, based on the New York standard mandating that the Appellate Division review questions of fact to determine whether the verdict represented "reasonable compensation" [23a (citing N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995)].

The Second Circuit's application of the state standard of appellate review to examine the jury award for excessiveness violates this Court's clear holdings in prior cases, and violates a plaintiff's right to a jury trial in federal court consistent with the protections afforded by the Seventh Amendment to the United States Constitution. For this reason alone, certiorari should issue to resolve the Second Circuit's conflict with this Court's precedents. Sup. Ct. R. 10.1(c).

In addition, the decision below is a further, dramatic example of the confusion and conflict that has developed among the federal circuits regarding the appropriate standard of appellate review to be applied in diversity actions when reviewing jury awards for excessiveness. Sup. Ct. R. 10.1(a).

Hence, this case, like *Gasperini*, provides an important opportunity for this Court to resolve these conflicts, establish clear federal standards once and for all, and preserve the Seventh Amendment's guarantee of the right to a jury trial.[3]

B. Factual Background and Trial Proceedings

Plaintiff John Consorti and his wife, Frances Consorti, commenced this diversity personal injury action in the United States District Court for the Southern District of New York against respondent Owens-Corning Fiberglas Corporation [hereinafter "OCF"] and a number of other manufacturers of asbestos-containing products. As a result of his occupational contact with these products, Mr. Consorti, in 1991, began suffering from mesothelioma, an incurable cancer of the lining of the lung whose only known cause is exposure to asbestos.

The uncontroverted evidence before the jury of Mr. Consorti's excruciating ordeal was detailed and abundant. Indeed, the Second Circuit noted that Mr. Consorti had demonstrated at trial that he "had endured enormous suffering from the mesothelioma and was likely to die within a few more months" [5a].[4] The Court further acknowledged that, owing to the enormity of Mr. Consorti's anguish, "reasonable people of his age, in good mental and physical health, would not have traded one-quarter of his suffering for a hundred million dollars, much less twelve" [14a].

Nonetheless, the Second Circuit, unlike the jury and the District Court, did not have the opportunity to witness Mr. Consorti's appearance in court, or to hear his testimony and that of his family regarding his illness. In this context, the jury returned a verdict of $8 million for 23 months of Mr.

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[3] Additionally, although a briefing schedule has already been issued in *Gasperini*, petitioners request that this Court hear the two cases simultaneously.

[4] The jury's verdict was based on Mr. Consorti's 23 months of pain and suffering prior to verdict, as well as an estimated nine (9) additional months of post-verdict suffering.

Consorti's past pain and suffering, and, with his agony intensifying each day, $4 million for the nine months to follow [6a].[5]

After verdict, OCF moved to set aside the verdict, and for a new trial, or a remittitur, arguing that the trial judge erred in certain respects and, independently, that the jury's award was excessive. After extensive briefing, the Hon. Robert W. Sweet concluded that the jury's award for Mr. Consorti's pain and suffering award was "certainly not without basis in the record" [73a] and that "the judicial conscience is not shocked" [75a, 94a, 6a]. The trial judge, from the unique vantage point of having personally seen this asbestos victim as well as the family witnesses, explained, "[t]he conscience of courts must not remain fixed in time but must rather retain the capacity for change based on the experience of others and the determinations made in particular cases" [74a].[6]

C. The Second Circuit's Decision

The Second Circuit found no error at trial, and expressly rejected OCF's argument that the District Court "erred in consolidating the cases of [four] plaintiffs into a single trial" [7a]. The Panel concluded that, as administered by Judge Sweet, the consolidation produced, "with efficiency and greatly reduced expense for all parties, a fairer, more rational and evenhanded delivery of justice" than would have occurred

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[5] It should be noted that, in all events, Mrs. Consorti would not ultimately receive compensation in the full amount of the jury's award. Rather, this amount would be subject to the judgment molding formula prescribed by New York's General Obligations Law § 15-108, which mandates reductions in the verdict amounts to account for settlements and settling defendants' shares of fault.

[6] Nevertheless, based on his careful analysis, and consistent with his record of not hesitating to reduce awards which he deemed to be legally excessive, the trial judge did reduce Mrs. Consorti's loss of future consortium award, as well as other damage awards in the consolidated trial [94a, 6a].

with separate trials [8a]. The Second Circuit similarly rejected OCF's other claims of trial error [29a-32a].

Nonetheless, the Second Circuit overturned the jury's award for Mr. Consorti's pain and suffering as excessive, and ordered a new trial unless the Consortis agreed to accept a substantially reduced award [32a].

The Second Circuit's decision was remarkable because it held that, in a diversity action, state law governs not only substantive issues, but also the appellate standard for reviewing the jury's verdict [18a-19a]. Under the New York standard, the Appellate Division—which is empowered to make *de novo* findings of fact—"shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney 1995) [cited at 20a, 23a]. The Second Circuit acknowledged that this standard "is less deferential to the jury's verdict than the federal standard of whether the award was so excessive as to shock the conscience of the court" [18a]. The Panel further explained that "[m]aterial deviation from reasonableness is less than that deviation required to find an award so excessive as to 'shock the conscience' " [23a].

Thus, apparently viewing itself as unbound by the Seventh Amendment or the federal standard, the Second Circuit proceeded to a *de novo* review of the reasonableness of the jury's award under New York State law [24a]. The Court not only disregarded recent federal trial court outcomes in New York, which had allowed verdicts such as those in the present case [24a-25a], but similarly discounted recent *state* trial court rulings which permitted substantially increased pain and suffering awards in cancer cases [28a n.16]. Instead, the Second Circuit engaged in a quasi-legislative exercise and considered such factors as predictability and consistency of verdicts, risk behavior management, increased insurance premiums and prices of goods, limited resources to compensate later

claimants, and so forth, in determining what it believed to be "reasonable" compensation for pain and suffering [15a-18a]. Upon these bases, wholly at odds with the federal "shock the conscience" standard of review, the Second Circuit dramatically reduced the original jury award [29a]. In so doing, the Panel similarly abandoned the universally accepted "abuse of discretion" standard in reviewing the District Court's denial of OCF's post-verdict motions.

In reaching its holding, the Second Circuit candidly acknowledged that several other circuits "continue[ ] to apply federal standards of excessiveness" in diversity suits [21a n.9, 20a n.8]. The Second Circuit specifically noted that its holding was in direct conflict with recent decisions by the Fourth, Seventh and Tenth Circuits [*id.*] (citing *Mayer v. Gary Partners & Co. Ltd.*, 29 F.3d 330, 334 (7th Cir. 1994); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991); *The Post Office v. Portec, Inc.*, 913 F.2d 802, 809-10 (10th Cir. 1990), *vacated and remanded*, 499 U.S. 915 (1991), *appeal dismissed per stipulation*, 935 F.2d 1105 (10th Cir. 1991)) [*see also* 20a n.8 (discussing Eighth Circuit cases applying the federal standard)].

The Second Circuit also implicitly acknowledged the tension between its holding and what the Panel described as this Court's "extraordinarily broad statement" in *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977), that "[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a question of federal law . . ." [19a].

However, the Second Circuit erroneously interpreted this Court's ruling in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), and, in particular, this Court's statement in that case that "the propriety of an award of punitive damages . . . [is a] question[ ] of state law." *Id.* at 278. While in a diversity suit state substantive law certainly controls on the issue of whether a category of dam-

ages is available, *the standard of review* of a jury award is nonetheless governed by federal, and not state, law.

The Second Circuit's interpretation notwithstanding, this Court in *Browning-Ferris* certainly did not overrule its earlier pronouncement in *Donovan*. Instead, in *Browning-Ferris*, this Court reiterated the settled rule that "[f]ederal law . . . will control on those issues involving the proper review of the jury award by a federal district court and court of appeals." 492 U.S. at 278-79.[7]

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S APPLICATION OF A STATE STANDARD FOR APPELLATE REVIEW OF A FEDERAL JURY VERDICT CONFLICTS DIRECTLY WITH THE DECISIONS OF THIS COURT

The Second Circuit's decision below conflicts directly with this Court's pronouncements in *Browning-Ferris Industries Yennont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), and *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977). In *Browning-Ferris*, this Court considered the interplay of state and federal law in appellate review of jury verdicts for excessiveness:

> It is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our only inquiry is whether the Court of Appeals erred in finding that the district court did not abuse its discretion in refusing to grant petitioners'

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[7] Indeed, prior to its decisions in the present case and in *Gasperini*, the Second Circuit has itself correctly recognized that, "[a]s remittitur concerns the relationship between the federal judge and jury, it is a question of federal law." *Karlson v. 305 East 43rd Street Corp.*, 370 F.2d 467, 472 n.1 (2d Cir.), *cert. denied*, 387 U.S. 905 (1967).

> motion, under Federal Rule of Civil Procedure 59, for a new trial or remittitur. . . . *Federal law . . . will control on those issues involving the proper review of the jury award by a federal district court and court of appeals.* . . .

492 U.S. at 278-79. (citations and footnotes omitted) (emphasis supplied).[8] See also *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649-50 (1977) ("[t]he proper role of the trial and appellate court in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law").

In direct conflict with *Browning-Ferris* and *Donovan*, however, the Second Circuit held that, in a diversity action, state and not federal law governs appellate review of a federal jury award for excessiveness [20a-21a].

The importance of the Second Circuit's conflict with this Court's rulings in *Browning-Ferris* and *Donovan* cannot be overstated. Federal courts, including those exercising diversity jurisdiction, are bound by the constraints of the Seventh Amendment. *Browning-Ferris*, 492 U.S. at 280 n.26 ("federal courts operate under the strictures of the Seventh Amendment"); *see also A. & G. Stevedores v. Ellerman Lines*, 369 U.S. 355, 359-60 (1962). Conversely, the state courts are not bound by the Seventh Amendment. *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931). Thus, the states are free to adopt highly intrusive standards for appellate review of jury verdicts, unrestricted by Seventh Amendment concerns. As a result, importing state standards into diversity cases may completely eviscerate Seventh Amendment protections.

Yet, that is precisely what occurred in this case. The state standard adopted by the Second Circuit mandates that "[t]he

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[8] Because the Court upheld the jury verdict in *Browning-Ferris*, it declined to reach the question of whether the Seventh Amendment allowed appellate review of jury verdicts at all. 492 U.S. at 279 n.25.

appellate division shall review questions of law and questions of fact . . . [and] "*shall* determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R § 5501(c) (McKinney 1995) (emphasis supplied) (quoted at 23a).[9] According to the Second Circuit, this standard requires appellate courts to "exercise closer control over jury awards" [22a-23a], and therefore, is far more intrusive than the federal standard. *See* David Siegel, Practice Commentary, N.Y. Civ. Prac. L. & R. § 5501, at 24 (McKinney 1995). It is therefore clear that application of the New York standard by a federal appellate court violates the Seventh Amendment.

It is well to recall Chief Justice Rehnquist's reasoning in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979):

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny . . . a safeguard too precious to be left to the whim of . . . the judiciary. . . . Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, . . . and thus keep the administration of law in accord with the wishes of the community. . . . Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach.

439 U.S. at 343-44 (Rehnquist, J., dissenting on other grounds).

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[9] N.Y. Civ. Prac. L. & R. § 5501 sets forth the standard of review for all the New York appellate courts. Whereas subsection 5501(c) mandates *de novo* findings of fact by the Appellate Division (New York's intermediate appellate court), subsection 5501(b), in contrast, provides that the New York Court of Appeals (New York's high court) "shall review questions of law only, except that it shall also review questions of fact where the appellate division . . . has expressly or impliedly found new facts . . . ."

With respect to the standard by which claims of excessive verdicts should be reviewed by the United States courts of appeals, this Court should grant certiorari to resolve the significant conflict between the decision below and this Court's decisions preserving the Seventh Amendment right to a jury trial. *See* Sup. Ct. R. 10.1(c); *Pernell v. Southall Realty*, 416 U.S. 363, 365 (1974) (granting certiorari "[b]ecause of the novel nature of the Seventh Amendment question"); *Wilkerson v. McCarthy*, 336 U.S. 53, 55 (1949) (granting certiorari "because of the importance of preserving for litigants . . . their right to a jury trial").

II. THE SECOND CIRCUIT'S APPLICATION OF A STATE STANDARD OF APPELLATE REVIEW DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

The Second Circuit's holding is also in direct conflict with recent holdings of other circuits. The Court of Appeals for the First, Fourth, and Seventh Circuits have expressly held that, in diversity actions, the federal and not state standard applies to the appellate review of jury awards claimed to be excessive. *Laubach v. Khajawai*, No. 94-2421, 1995 WL 508879, WL op. at 2 (4th Cir. Aug. 29, 1995) (refusing to apply state standard for reviewing excessiveness because "the granting or denial of a new trial in a diversity action is a matter of procedure governed by federal law and not by state substantive law."); *Mayer v. Gary Partners and Co.*, 29 F.3d 330, 334-35 (7th Cir. 1994) (federal not state law applies to review of all issues concerning sufficiency of the evidence, including verdicts that are allegedly excessive); *Lakin v. Daniel Marr & Son*, 732 F.2d 233, 235 (1st Cir. 1984) ("we measure the excessiveness of a jury award not . . . according to the state's standard of review, but according to that ordinarily applied in the federal courts").[10]

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[10] The Sixth Circuit is also clearly in conflict with the decision below. *See Blasky v. Wheatley Trucking, Inc.*, 482 F.2d 497, 498 (6th Cir.

The Second Circuit's decision in this case also directly conflicts with the practice—if not the explicit holdings—of the Third and Tenth Circuits. *E.g., Peco Energy Co. v. Boden*, 64 F.3d 852, 859 (3d Cir. 1995) (applying federal "shocks the conscience" standard for reviewing claims of excessiveness in diversity actions); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1169-71 (10th Cir. 1981) (same).

While the Second Circuit is alone in its complete departure from the once axiomatic proposition that federal law governs appellate review of jury verdicts in diversity cases, the Fifth, Eighth and Eleventh Circuits have been ambiguous in their approach. In practice, these circuits, like the Second Circuit, wrongly apply state law when determining the scope and standard of review of jury verdicts based on a claim of excessiveness. *Petrowski v. Southworth Products*, 15 F.3d 748, 753-54 (8th Cir. 1994) (applying state standard of appellate review); *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441, 1446 (11th Cir. 1991) (while "federal law applies to our review of the decision to order a new trial as the result of an excessive verdict, . . . [w]e look to [the less deferential, state statutory standard of appellate review] to determine whether the verdict is excessive"); *In re Air Crash Disaster Near New Orleans, La.*, 764 F.2d 1084, 1090 (5th Cir. 1985) (while federal law determines procedural question of new trial, "we may not affirm an award which could not be affirmed by the highest court of the state whose law we are applying").

Recent decisions by the Seventh and Eighth Circuits illustrate sharply the doctrinal split among the circuits.

The Eighth Circuit recently re-affirmed that court's long standing adherence to the application of state law standards of appellate review when considering the excessiveness of

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1973) (state law is not controlling on whether to grant or deny new trial on the ground of excessiveness, as this issue is within discretion of the district court).

jury verdicts in diversity cases. *Petrowski*, 15 F.3d at 753-54; *see also Vanskike v. Union Pacific Railroad*, 725 F.2d 1146, 1150-51 (8th Cir. 1984) ("this court is aware of its duty to refer to the law of the forum state when determining the inadequacy or excessiveness of a jury verdict") (citing *Hysell v. Iowa Public Service Co.* 559 F.2d 468, 472 (8th Cir. 1977)).

In contrast, the Seventh Circuit has consistently applied federal standards of review to appeals alleging excessive jury verdicts. *Roggow v. Uincral Processing*, 894 F.2d 246, 249 (7th Cir. 1990); *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963. 970-71 (7th Cir. 1973). Moreover, while the Seventh Circuit has never deviated from this position, it had been inconsistent, until recently, on the broader issue of whether state or federal standards should apply to other aspects of the interaction between judge and jury. To correct this, the Seventh Circuit in *Mayer* relied on this Court's pronouncements in *Browning-Ferris* and *Donovan* and ended many years of confusion by adopting a uniform rule of applying federal standards of review to jury verdicts in diversity cases. Under its new uniform rule, federal and not state standards of review apply whenever either the trial judge or the appellate court considers a motion for a new trial on *any* basis. 29 F.3d at 334-35. Thus, the Seventh Circuit strongly stated its position that federal law must be applied by a federal court exercising diversity jurisdiction when reviewing jury verdicts claimed to be excessive.

Because the irreconcilable split among the circuits threatens the role of the jury as guaranteed by the Seventh Amendment, this Court should grant certiorari to resolve this conflict and set a clear standard. *See* Sup. Ct. R. 10.1(a) & (c).

III. THE SECOND CIRCUIT'S DECISION RAISES THE IMPORTANT, UNDECIDED QUESTION OF WHETHER THE SEVENTH AMENDMENT PERMITS AN APPELLATE COURT TO REVIEW A JURY AWARD FOR EXCESSIVENESS

As was true in *Gasperini*, petitioners in the instant case seek certiorari on the issue of whether the Seventh Amendment even permits an appellate court to review a claim that a jury's award is excessive. This Court should now settle this important federal question raised by the Second Circuit's decision below. *See* Sup. Ct. R. 10.1(c).

In preserving the right to trial by jury, the Seventh Amendment prescribes that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. Thus, appellate review of a jury's verdict on the issue of excessiveness, or the weight of the evidence generally, would be warranted under the Seventh Amendment only if appellate courts exercised such authority at common law.

However, "[e]veryone concedes that the weight of the evidence could not be raised by writ of error and thus was not subject to appellate review at the time the Seventh Amendment was adopted." Wright, Miller & Kane, § 2819 at 203 (2d ed. 1995). Thus, as these leading commentators have concluded, "[t]o allow appellate review of the denial of the new-trial motion . . . would be a complete reversal of common-law practice and is very difficult to reconcile with the Seventh Amendment." *Id* at 204.

In relatively recent times this Court has noted the importance of this issue, but has found it unnecessary to reach the question because it has upheld the jury's verdict. *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 n.25 (1989) ("[w]e have never held expressly that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an

award as excessive"); *Grunenthal v. Long Island R. Co.*, 393 U.S. 156, 158 (1968); *Neese v. Southern R. Co.*, 350 U.S. 77 (1955).

However, less than fifty years after the ratification of the Seventh Amendment, this Court held that

> it is a point too well settled to be now drawn into question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury, and the error is to be redressed, if at all, by application to the court below for a new trial, and cannot be made a ground of objection on a writ of error.

United States v. Laub, 37 U.S. (12 Pet.) 1, 5 (1838).

Moreover, as recently as 1940, this Court stated categorically: "Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 248 (1940).

Indeed, in 1933, this Court stressed that

> [t]he rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a Circuit Court of Appeals.

Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 (1933) (citations omitted); *see also Southern Ry.-Carolina Div. v. Bennett*, 233 U.S. 80, 87 (1914); *Metropolitan R. Co. v. Moore*, 121 U.S. 558, 574 (1887).

Nonetheless, in the last fifty years the federal circuit courts have aggressively and increasingly arrogated to themselves the power to review and reverse a trial court's denial of a

motion for a new trial solely on the ground that the verdict is excessive. *See* Wright, Miller & Kane § 2820, at 209 & n.10; *see also* Schnapper, supra, 1989 Wis. L. Rev. 237, 238, 248, 313.

Because the federal circuits have asserted their authority to review jury verdicts for excessiveness in the absence of any pronouncement from this Court, they are operating without ascertainable standards. This Court has never given explicit approval to any standard of review. Wright, Miller & Kane § 2820, at 212. Moreover, while all federal circuits have purportedly adopted standards requiring a strong showing before the verdict will be reversed, *see id.* at 212-14 & nn. 24-25 (citing cases), there is no uniformity among the circuits, and no clear articulation of what these inherently elastic standards mean. *See Grunenthal,* 393 U.S. at 159 n.4.

For example, many courts adhere to an "abuse of discretion" standard of review of the denial of a Rule 59 motion. Wright, Miller & Kane § 2820, at 212-13 & n. 24 (citing cases). However, a 1984-1985 study of appellate decisions found that,

> out of sixty-eight appeals involving a challenge to the size of a verdict, the original "abuse of discretion" standard was applied in only seven cases. Among the thirty-four cases overturning a verdict as excessive, there is not a single instance in which a panel purporting to apply an abuse of discretion standard actually found that such an abuse had occurred.

Schnapper, *supra*, 1989 Wis. L. Rev. at 320 (footnotes omitted). In other words, many federal courts of appeals have assumed the power to review jury verdicts *de novo*.

A number of circuits use a different standard, holding that a jury verdict will be overturned when it represents a "monstrous or shocking injustice," *Norton v. Caremark, Inc.*, 20 F.3d 330, 340 (8th Cir. 1994), is "grossly excessive, clearly

not supported by the evidence, or based only on speculation or guesswork," *Boem v. American Broadcasting Co., Inc.*, 929 F.2d 482, 488 (9th Cir. 1991), or constitutes a "grave abuse of discretion." *Baker v. Dillon*, 389 F.2d 57 (4th Cir. 1968); *see also* Wright, Miller & Kane § 2820, at 213-14 & n.25 (citing cases). As Schnapper observes:

> It would be a rather considerable exaggeration to characterize these formulations as legal standards. None of the appellate decisions provide any guidance for distinguishing a "shockingly" high verdict from one that is merely "stunningly," "surprisingly," or "very" high. One Fifth Circuit decision acknowledged that an appellate decision applying this formulation could not "be supported entirely by rational analysis. It is inherently subjective in large part, involving the interplay of experience and emotions as well as calculation."

Schnapper, supra, 1989 Wis. L. Rev. as 322-23 (quoting *In re Air Crash Disaster Near New Orleans, La.*, 767 F.2d 1151, 1156 (5th Cir. 1985)).

The Second Circuit's decision in this case highlights these common problems facing the federal appellate courts. For example, notwithstanding this Court's pronouncement in *Browning-Ferris* that "the court of appeals should then review the district court's [Rule 59] determination under an abuse-of-discretion standard," 492 U.S. at 279, the Second Circuit abandoned and made no mention of this standard, instead applying the state court standard applicable to New York's Appellate Division under N.Y. Civ. Prac. L. & R. § 5501.

Likewise, the Second Circuit erroneously held that, in diversity cases, "[t]o disregard New York law in this case, in favor of the federal 'shocks the conscience' standard, would violate the fundamental constitutional doctrine of *Erie* . . ." [20a]. Thus, the court applied the far more invasive state standard which requires New York State's Appellate Division to reverse a jury verdict whenever it "deviates materially" from

"what would be reasonable compensation" [23a]. By adopting the state standard, the Second Circuit placed itself in the role of a thirteenth juror—with veto power.

CONCLUSION

The decision below calls out for this Court's intervention. This Court has already granted certiorari in *Gasperini* in order to review the identical issue. It is well to note that, in deciding *Gasperini,* the Second Circuit fully relied upon its earlier ruling in the present case. Accordingly, this Court should grant certiorari to determine whether federal appellate courts may review jury verdicts for excessiveness, and if so, by which standard of review the courts should proceed consistent with the mandate of the Seventh Amendment.

For the foregoing reasons, the petition for a Writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

AMENDED OPINION

No. 857—August Term, 1994

(Argued: November 14, 1994

Decided: August 28, 1995)

Amended: December 22, 1995)

Docket No. 94-7501

JOHN CONSORTI & FRANCES CONSORTI,

Plaintiffs-Appellees,

—v.—

ARMSTRONG WORLD INDUSTRIES, INC., formerly known as Armstrong Cork Co.; COMBUSTION ENGINEERING, INC., et al.,

Defendants,

OWENS-CORNING FIBERGLAS CORP.,

Defendant-Appellant.

Before:

NEWMAN, *Chief Judge,*
ALTIMARI and LEVAL, *Circuit Judges.*

Appeal from the judgment of the United States District Court for the Southern District of New York (Robert W. Sweet, *Judge*) after a jury trial, awarding damages against an asbestos manufacturer for injuries caused by mesothelioma, an asbestos-related form of cancer. Defendant-appellant claims error as to several aspects of the trial, primarily consolidation of the cases of several plaintiffs, excessiveness of the award to John Consorti for pain and suffering, a recommendation by counsel to the jury as to the award amount, and the award to the spouse for loss of consortium.

Reversed and remanded for a new trial on the issue of damages for pain and suffering unless plaintiffs agree to remit all damages in excess of $3.5 million. By previous order of this court, the determination of the spouse's consortium claim was certified to the New York State Court of Appeals, which ruled that no cause of action was provided under New York law. Accordingly, we vacate that portion of the judgment awarded for loss of consortium. Affirmed in all other respects.

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WILLIAM G. BALLAINE, New York, N.Y., (Mark S. Landman, Joanna L. Watman, Siff Rosen, New York, N.Y., Of Counsel), *Attorneys for Defendant-Appellant.*

LEVAL, *Circuit Judge*:

Owens-Corning Fiberglas Corporation ("OCF"), a fabricator of asbestos pipe-covering products, appeals from jury verdicts in favor of John Consorti, a pipe insulation worker who developed mesothelioma as the result of exposure to asbestos dust, and his wife Frances for loss of consortium. The trial in the Southern District of New York before Robert W. Sweet, *Judge*, which consumed 25 trial days, consolidated the claims of four plaintiff couples against numerous manufacturers of asbestos products. The jury rendered verdicts for the plaintiffs totalling in excess of $47 million. OCF's main claims on appeal are: (1) that the four cases should not have been consolidated; (2) that the $12 million award for John Consorti's pain and suffering was excessive; and (3) that Frances Consorti had no claim under New York law for loss of consortium because John's noxious exposure occurred prior to their marriage. OCF also challenges the sufficiency of evidence on various points, and numerous rulings made at trial.

We certified the question of Mrs. Consorti's entitlement to sue for loss of consortium to the New York Court of Appeals. *Consorti v. Owens Corning Fiberglas Corp.*, 45 F.3d 48, 49 (2d Cir. 1995). On October 24, 1995, the Court of Appeals ruled that the facts proved do not give rise to a cause of action for loss of consortium under New York law. *Consorti v. Owens-Corning Fiberglas Corp.*, 1995 WL 619791 (N.Y. Oct. 24, 1995). Accordingly, we vacate the award for loss of consortium. We affirm on all other issues except the size of John Consorti's award for pain and suffering, which we believe was beyond what New York law permits.

BACKGROUND

A detailed account of the case is set forth in the district court's opinion in *In re New York Asbestos Litig.*, 847 F. Supp. 1086 (S.D.N.Y. 1994) ("*Consorti et al.*"). We include here only the facts necessary for the discussion below.

John Consorti ("Consorti") was a 40% owner of Veteran Pipe Covering, a family insulator business. He worked for Veteran as a pipe covering insulator from 1960 to 1963, and from 1970 to 1978. From 1963 to 1970, he worked as an insulator for another family business, State Pipe Covering. In 1978, he became Vice-President of Veteran, a position in which he remained until 1992. While working at these businesses, and at least through the mid-1970s, Consorti was exposed to asbestos products, including OCF's product.

Consorti began to suffer back problems in August 1991. In February 1992, he was diagnosed with pleural mesothelioma, an incurable cancer of the lining of the lung. He died after trial, at the age of 51, in November 1993.

Consorti initiated his asbestos personal injury action in August 1992 against numerous defendants in the Southern District of New York. His suit was one of the many thousands of asbestos cases reassigned by the Multi-District Litigation Panel to the Eastern District of Pennsylvania for discovery and pre-trial proceedings. Because of his rapidly advancing illness, his case was deemed an emergency "hardship" and was remanded to the Southern District of New York for expedited trial. It was consolidated for trial in 1993 with three other cases of mesothelioma due to asbestos exposure. *In re New*

York Asbestos Litig., 145 F.R.D. 644 (S.D.N.Y. 1993) ("*New York Asbestos I*"); *In re New York Asbestos Litig.*, 149 F.R.D. 490 (S.D.N.Y. 1993) ("*New York Asbestos II*"). OCF was a defendant only in the Consorti action.

OCF moved to sever the Consortis' case from the other plaintiffs, and the court denied the motion. *New York Asbestos II*, 149 F.R.D. at 491.

The trial of the consolidated action began on June 21, 1993. At trial, Consorti proved that his incurable fatal disease was caused by his ingestion and respiration of asbestos fibers. He demonstrated that he had endured enormous suffering from the mesothelioma and was likely to die within a few more months.

On July 22, 1993, after a five-week trial, the jury returned its first special verdict, awarding another plaintiff, Vincent Tabolt, over $13 million in damages, including $7.5 million for approximately 18 months of pain and suffering. After the jury announced the award, Judge Sweet, seeking to encourage the panel after its long days of hard work, said:

> You are probably the best jury that has ever been put together in the United States of America. You paid very close attention, you worked very hard. . . . Thank you very much for the good work you have done.

Outside the presence of the jury, OCF objected to the court's praise of the jury, arguing that the judge's remarks would be taken as approval of the enormous verdict and would influence the verdicts yet to be rendered. The following day, the court denied a motion for a mistrial, but gave a curative instruction:

> I wanted to be clear that since you have entered a verdict in one case that I was referring, of course, not to the verdict in any way, about which I have no control, that is entirely in your hands, but, rather, in the way in which you conducted yourselves . . . . It's the way in which you have conducted yourself, not the verdict itself.

The jury then deliberated on the Consorti case. In summation, plaintiffs' counsel had suggested awards of $8 million for John Consorti's past pain and suffering, plus $4 million for his future suffering. The jury returned a verdict that awarded exactly those amounts. The jury found John's remaining life expectancy to be nine months. OCF was found 7% responsible for Consorti's injuries.

OCF moved for judgment as a matter of law, a new trial, or a remittitur, all of which were denied. However, the court did conclude that the jury's calculation of Frances Consorti's future non-economic loss was against the weight of the evidence and must be set aside. *Consorti et al.*, 847 F. Supp. at 1105. In lieu of a new trial, the parties stipulated to an award for non-economic consortium of $332,000. The district court also reduced the verdict on economic damages for Frances's loss of future consortium to $750,000. *Id.* at 1106.

After judgment molding, the district court entered judgment against OCF for more than $11.5 million. *Id.* at 1086. This appeal followed.

DISCUSSION

OCF appeals numerous aspects of the case below and asks that the judgment be set aside or that remittitur be ordered.

A. *Consolidation*

Relying on a flawed understanding of our holding in *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993), OCF contends that Judge Sweet erred in consolidating the cases of several plaintiffs into a single trial. OCF treats *Malcolm* as establishing a strong anti-consolidation bias. We take pains to emphasize that we have made no such suggestion. The reversal in *Malcolm* was attributable to factors unique to that case. We stressed that "[w]e do not wish to be understood as condemning all consolidations of asbestos cases." 995 F.2d at 354. In fact, after observing that the federal courts were "swamped with asbestos suits," 995 F.2d at 348, and that the " 'heyday of individual adjudication of asbestos mass tort lawsuits has long passed,' " *id.* (quoting *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 419 (J.P.M.L. 1991)), we indicated that another consolidation of a substantially larger number of asbestos cases coming from the Brooklyn Navy Yard (which were not appealed on that ground) would have passed muster. 995 F.2d at 353.

Consolidation is a valuable and important tool of judicial administration. This is especially true when the courts are overwhelmed with huge numbers of cases which involve substantially the same questions of fact, as happens when large numbers of plaintiffs allege that they have developed similar illnesses in reaction to a particular toxic substance. *See* Fed. R. Civ. P. 42(a). In

such circumstances, consolidation permits the federal court to furnish trials in hundreds, even thousands of cases it might otherwise not reach for many years. If carefully and properly administered, as it was by Judge Sweet below, consolidation is also capable of producing, with efficiency and greatly reduced expense for all parties, a fairer, more rational and evenhanded delivery of justice.

We noted in *Malcolm* that at that time more than 200,000 asbestos cases had been filed in state and federal courts, with as many as 250,000 additional cases expected to come. 995 F.2d at 348. It requires little imagination to recognize that without consolidation the courts are simply incapable of handling litigation of such volume. The waste of time and expense involved in empaneling separate juries to decide the same sorts of questions over and over again is staggering. This is all the more true when one recognizes that each successive jury must be educated by expert witnesses to understand the toxicity of asbestos fibers, the etiology of asbestos-induced diseases, the state of the art regarding the industry's knowledge of these dangers through the years, and the economic issues involving loss of services and future income that recur so frequently in these cases.

Needless to say, efficiency cannot be permitted to prevail at the expense of justice. *Id.* at 350. The obligation of the courts to deliver justice is paramount, and it may not be scrapped for the benefit of cheaper and more rapid dispositions. *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir.), *cert. denied*, 498 U.S. 920 (1990). On the other hand, the judiciary, like every other institution, must be open to discarding habits that have outlived their usefulness, and must bend under the pressures of modern life to find greater efficiency in accomplish-

ing its mission. When enormous savings of expense and gains of efficiency can be accomplished *without sacrifice of justice*, courts must be ready to alter their procedures. *See* American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* 16-18 (1994).

This is all the more true when increases in efficiency also *improve* the quality of the justice rendered. When cases are properly chosen for consolidation and well administered, this will be the case. One of the most persistent and troublesome problems in the administration of justice in our civil jury system is the unpredictable relationship between different juries' awards, particularly for intangibles such as pain and suffering. It of course should be the goal of the overall administration of such litigation that more seriously injured plaintiffs receive higher compensation than those less seriously injured. However, when each case is tried before a different jury, the relationship between the size of one judgment for intangibles and another will be largely happenstance. *See generally* James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 Yale J. on Reg. 171, 177 (1991). When numerous claims are tried before a single jury, that jury will recognize that an important part of its chore is to scale the relative seriousness of the various plaintiffs' injuries and to see to it that their respective awards are consistent with that scaling.

Different juries also can produce inconsistent verdicts on liability and the extent of responsibility. This may be encouraged by counsel's litigation strategy. When only a small segment of a much larger picture is before the jury, counsel can present a deceptive view of the relative

responsibility of various actors—especially entities that are absent from the trial. This becomes far more difficult when the jury is considering a broader spectrum of information and more of the relevant actors are present defending their positions. *See* Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. Pa. L. Rev. 7, 15 (1986) ("Beyond the sheer economy of not having to litigate the same matters twice, consolidation . . . can reduce such problems as inconsistent outcomes, whipsawing (from the ability of defendants in separate litigations to point to a nonparty as the one truly liable), and uncoordinated scrambles for the assets of a limited fund.") (footnotes omitted).

Furthermore, no logic supports the proposition that the incremental addition of similar cases will reduce the jury's ability to understand and resolve the issues placed before it. Without doubt, consideration of a single toxic tort case is challenging, requiring jurors to grapple with complicated issues of chemistry and medicine. But it does not follow that the jury will be less able to deal with those issues if the same questions are repeatedly put to it over a substantially longer period of time. Quite to the contrary, if a jury spends many weeks, or many months, considering numerous cases of asbestos disease, and repetitively hears the disputes of experts and the arguments of counsel on case after case, that jury is likely to develop a far deeper understanding of the issues than a jury whose exposure to those complicated questions is brief, and requires answering only a single set of questions.

Malcolm suggests nothing to the contrary. The majority in *Malcolm*, over Judge Walker's dissent, found various case-specific problems that led it to the conclusion

that justice had been sacrificed. A principal problem identified in *Malcolm* was that the very basis of consolidation was found to be inapplicable to the case. The consolidation was premised on the supposed fact that each plaintiff had spent more than 50% of his work history at one or more of 40-odd power plant construction sites in New York State. *Malcolm*, 995 F.2d at 351. At trial, however, it emerged that several plaintiffs had spent only small fractions of their exposure history at power plant sites, and the jury in fact had before it evidence of over 250 work sites with varying product mixes. *Id.* Another problem was that 13 days before trial, over 200 companies had been impleaded as third-party defendants, and some of them in turn impleaded fourth-party defendants. *Id.* at 348. The court expressly queried whether these late-added parties had adequate opportunity to prepare for trial. *Id.* at 352. The most critical problem undermining the *Malcolm* consolidated verdict was the majority's perception that, instead of apportioning responsibility on the basis of the evidence, the jury had simply "throw[n] up its hands," *id.*, and apportioned "an equal 9% liability to each defendant," *id.*, in spite of the fact that "the evidence regarding [plaintiffs'] exposure to [the defendant's] products was vague, minimal, and heavily circumstantial when compared to the extensive evidence regarding the products of [another defendant] . . . ." *Id.*

OCF argues that some of the factors we listed in *Johnson*, 899 F.2d at 1285, and *Malcolm*, 995 F.2d at 350-51, as helpful in analyzing the propriety of consolidation, weigh against consolidation here. Prior to trial, Judge Sweet entertained a reconsideration of consolidation in light of our newly-issued *Malcolm* decision. He reviewed those factors carefully and adhered to his deci-

sion that consolidation was proper. *New York Asbestos II*, 149 F.R.D. at 499. It is important to remember that factors noted by a court as helpful in analyzing a particular question are no more than that; they are not a substitute for answering the question itself. When the issue for an appellate court is whether the trial court's decision to consolidate exceeded its discretion, the question remains whether the consolidation caused such confusion or prejudice as to render the jury incapable of finding the facts on the basis of the evidence. It is clear the consolidation here had no such consequence.

Furthermore, we have noted repeatedly that a district court can greatly assist a jury in comprehending complex evidence through the use of intelligent management devices. *See, e.g., Johnson*, 899 F.2d at 1285; *Malcolm*, 995 F.2d at 349, 352-53. Such management devices include organizing evidence by topic, using charts and visual aids, allowing note-taking by jurors, furnishing the jury with notebooks and albums of pertinent exhibits structured in a manner to help it master complex materials, interim explanations by the judge on issues of law and fact and on the limited use of evidence, interim addresses to the jury by counsel,[1] and questionnaires and special verdict forms to help the jury approach deliberations in a well-organized fashion.

Judge Sweet took numerous such steps to help the jury segregate the issues before it and distinguish among the four sets of plaintiffs and the various defendants. The jury was provided specialized notebooks with a photograph of each plaintiff, accompanied by undisputed biographical information. Jurors were encouraged to take extensive notes during trial. During opening statements

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[1] *See* Pierre N. Leval, *From the Bench: Westmoreland v. CBS*, Litigation, Fall 1985, at 7, 66.

and summations, counsel used charts to help the jury distinguish among the plaintiffs' exposure histories, together with time lines to help the jury differentiate between relevant periods in the state of the art. Counsel also provided citations to the trial record to help guide the jury to arguments regarding specific evidence. *Consorti, et al.*, 847 F. Supp. at 1093. Throughout the trial, Judge Sweet gave numerous cautionary and limiting instructions to assist the jury in its understanding of the bearing of the evidence on the various cases. The verdict forms which Judge Sweet prepared guided the jury step by step through the various issues it needed to consider and resolve. The jury was encouraged to consider each case separately.

By implementing such measures, Judge Sweet insured that plaintiffs and defendants received a trial by jury that fairly addressed the individual claims while effectively managing the resources of the court and giving the parties the benefit of an efficient and economical trial. We have no reason to believe that the consolidation prevented the jury from rendering verdicts based on the evidence as it related to each independent claim. OCF's contention of improper consolidation is without merit.

B. *Excessiveness of Award for Pain and Suffering*

OCF claims that the award to John Consorti of $12 million for his pain and suffering was excessive and should be set aside. We agree.

1. *The Role of Judge and Jury*

We note at the start, our finding in no way deprecates the enormous suffering that John Consorti endured. He developed a tumor which gradually enveloped his spine. The tumor pressed against his vocal cords, causing him

to lose his voice and choke. It interfered with eating, swallowing, even breathing. His circulatory system was impaired, causing painful and disfiguring swelling of his head and neck. And, as his disease progressed, it became increasingly difficult (later impossible) for him to walk or to care for himself. His pain grew worse as time passed, and was, of course, deepened by the certainty of imminent death. We take it as a given that reasonable people of his age, in good mental and physical health, would not have traded one-quarter of his suffering for a hundred million dollars, much less twelve.

It does not follow that courts should permit a verdict of a hundred million dollars, or twelve million, to stand. While the law seeks by reasonable compensation to make a plaintiff whole, we must recognize that compensation for suffering can be accomplished only in a symbolic and arbitrary fashion. There are at least two serious shortcomings to the endeavor. First, money awards do not make one whole; they do not alleviate pain. Second, there is no rational scale that justifies the award of any particular amount, as opposed to some very different amount, in compensation for a particular quantum of pain. *See Gibbs v. United States*, 599 F.2d 36, 39 (2d Cir. 1979) ("measuring pain and suffering in dollars is inescapably subjective"); 2 American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury* 201-02 (1991).[2]

We acknowledge furthermore that a judge's training in law gives the judge no greater ability than a jury to

[2] Juries may be especially inclined to make substantial awards when they believe that the defendant's liability is covered by insurance. While insurance frequently does cover the liability, jurors may neglect to consider the broader effect of their award on insurance premiums. *See* W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* 591 (5th ed. 1984).

determine the dollar amount that appropriately compensates any particular level of suffering. *See* 2 American Law Institute, *supra*, at 202. This recognition can lead judges to abdicate responsibility for review of jury verdicts. As we have no greater knowledge than jurors of the amount of money that suitably compensates for suffering, the question arises why our assessment should take precedence over theirs?

Nonetheless, there are important reasons why courts cannot properly leave it to juries to set the limits of compensation for such injuries. Even where the law is incapable of furnishing a rational answer, it seeks at least to be evenhanded, fair, and predictable. It should be our goal that persons who endure a similar degree of suffering can expect to receive a roughly similar award of compensation, *see Nairn v. Nat'l R.R. Passenger Corp.*, 837 F.2d 565, 568 (2d Cir. 1988) (vacating a damages award as excessive in light of awards for similar injuries in other cases), and that similarly situated defendants be burdened by similar judgments. If each jury is given unbridled authority to set the level of damages, awards will vary widely and unpredictably. Great discrepancies in awards destroy the fairness of the judicial system, as well as the predictability of litigation. This vigilance must be directed not only against awards that are too high, but also against those that are too low. *See, e.g., In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853-54 (2d Cir. 1992) (ordering new trial on issue of pain and suffering where award of $25,000 was so low, given evidence of lengthy and intense suffering, as to shock the conscience). Such goals cannot be achieved unless courts exercise responsibility to keep jury awards within limits. *Cf. Restatement (Second) of Torts* § 901 (1977) (note) (describing rules for determining damage

awards); Fowler V. Harper et al., *The Law of Torts* 250-51 (2d ed. 1985) (describing judge's role in fashioning tort damages).

The unpredictability of jury awards is pernicious not only because it is unfair. Widely varying jury verdicts make it difficult for risk bearers to structure their behavior to efficiently manage risk. While it is an aim of tort law to deter wrongful conduct, *see Restatement (Second) of Torts* § 901 (1977), at the same time tort law seeks to avoid over-deterrence that would stifle socially valuable enterprise.

> Where liability costs are relatively predictable, they can be avoided (where it is efficient to do so) or 'built in' to the costs of goods and services. . . . But errors in valuation may cause over-deterrence—the taking of too many costly precautions, or withdrawal from risky activity altogether. For example, during the liability insurance crisis of the 1980s, many obstetricians reportedly stopped delivering babies, and some manufacturers ceased development or production of certain drugs and goods.

Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 Nw. U. L. Rev. 908, 925 (1989) (citations omitted). *See also* Peter H. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* 289 (1987) (arguing that "individual juries acting in isolated tort cases . . . seem especially prone to overdeter some risky activities," thereby "discourag[ing] the taking of risks from which society might well benefit"); Peter H. Schuck, Introduction to *Tort Law and the Public Interest* 31-36 (Peter H. Schuck ed. 1991) (describing empirical research); 2 American Law Institute, *supra*, at 202-03; Oscar G. Chase, *Helping Jurors*

Determine Pain and Suffering Awards, 23 Hofstra L. Rev. 763, 769 (1995). When courts fail to exercise the responsibility to curb excessive verdicts, the effects are uncertainty and an upward spiral. One excessive verdict, permitted to stand, becomes precedent for another still larger one.[3] Unbridled, spiraling, excessive judgments predictably impose huge costs on society.

A failure by courts to impose limits on jury verdicts would cause serious social dislocation. At the first level, unchecked costs attributable to tort liability, and resultant increases in insurance premiums, would inevitably raise the price of goods and services to the public. More serious exaggeration in unchecked jury awards can cause bankruptcies in productive enterprises, with consequent disappearance of jobs, and even bankruptcies among insurers, leaving segments of society unprotected. Finally, in the circumstance represented by asbestos litigation, where it appears virtually certain that the resources of major defendants will eventually be completely consumed by their liabilities, allowing excessive awards to stand in the early stages of the litigation of the many thousands of cases they face will mean that overcompensation of the early plaintiffs will leave insufficient resources for the equally deserving plaintiffs whose cases are heard later.[4]

For all these reasons, even if courts have no better ability than jurors to measure the dollar value of pain,

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[3] See discussion below at n.13.

[4] For example, Keene Corporation informed the trial court that it had already spent over $430 million to resolve 95,000 claims, with 98,000 others still pending; it had no further insurance coverage, and would "run out of funds long before all of the present claimants have been even partially compensated." Keene advised the court, "[T]here is no hope that those who filed late claims or who file claims in the future will receive any compensation." *New York Asbestos II*, 149 F.R.D. at 499-500.

they must accept the responsibility of controlling the limits of jury awards. *See generally* David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256 (1989) (advocating increased judicial supervision of jury awards for pain and suffering prior to death).[5]

2. *The Award for Consorti's Pain and Suffering*

The first step in deciding whether the award of $12 million for John Consorti's pain and suffering is excessive must be to ascertain whether federal or state rules apply. The question has significance in this case because the New York rule, discussed below, is less deferential to the jury's verdict than the federal standard of whether the award was so excessive as to shock the conscience of the court. *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 683 & n.7 (2d Cir. 1993); *see, e.g., Nairn v. National R.R. Passenger Corp.*, 837 F.2d 565, 567 (2d Cir. 1988) (applying federal standard in FELA case). We held in *Martell v. Boardwalk Enters., Inc.*, 748 F.2d 740, 750 (2d Cir. 1984), that in a federal court diversity suit state law governs the issue of excessiveness of a jury verdict on a motion for remittitur. Plaintiffs contend that decision was inconsistent with the Supreme Court's ruling in *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977). Accordingly, we review the question.

Since the landmark decision of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), it has been a hallmark of federalism that a federal court sitting in diversity, while using its own rules to govern procedural matters, will

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[5] We note that in the punitive damages context, the Supreme Court has held the availability of judicial review over jury awards to be constitutionally required. *See Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331, 2340-41 (1994).

apply the substantive law of the forum state. The application of this standard to questions of remittitur has caused considerable confusion. *See In re Air Crash Disaster Near New Orleans*, 767 F.2d 1151, 1155 & n.4 (5th Cir. 1985) (noting "apparent conflict in the cases concerning whether the excessiveness of a verdict is a matter governed by state or federal law"); 19A Charles A. Wright et al., *Federal Practice and Procedure* § 4511 n.23 (1982 & Supp. 1995).[6] This is perhaps because courts have not always recognized that a question of remittitur arising in a particular case can involve either procedural or substantive issues, or both.

The Supreme Court's decision in *Donovan* involved a procedural question—whether a plaintiff who has accepted a district court's offer of remittitur may nonetheless appeal its determination that the jury's verdict was excessive. The Supreme Court unsurprisingly ruled that such a question arising in a case heard in the federal diversity jurisdiction would be governed by federal law. In delivering its ruling, however, the Court made an extraordinarily broad statement that "[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law . . . ." *Donovan*, 429 U.S. at 649.[7] Citing this language, plaintiffs contend that all remittitur questions are to be governed by federal rules. We do not agree.

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[6] Our court has twice found it unnecessary to resolve this question in the context of the New York remittitur statute. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1190 (2d Cir.), *cert. denied*, 113 S. Ct. 82 (1992); *Gardner v. Federated Dep't Stores, Inc.*, 907 F.2d 1348, 1353 n.1 (2d Cir. 1990).

[7] This court, too, has made confusingly broad categorical statements on this subject in the past. *See West v. Jutras*, 456 F.2d 1222, 1225 n.6 (2d Cir. 1972); *Karlson v. 305 East 43rd Street Corp.*, 370 F.2d 467, 472 n.1 (2d Cir.), *cert. denied*, 387 U.S. 905 (1967).

The question we face is how much money John Consorti may be awarded in damages by reason of his pain and suffering. This is an issue of substantive rights under the laws of New York. If, for example, New York's statutes provided that no compensation was to be awarded for nonpecuniary loss, or scheduled the awardable amounts in the manner of workers' compensation statutes—*i.e.*, $X for injury to an arm, $Y for injury to a leg, $Z maximum for pain and suffering—federal courts ruling in diversity would unquestionably be bound by those substantive rules. *See Blaskey v. Wheatley Trucking, Inc.*, 482 F.2d 497, 498-99 (6th Cir. 1973) (Ohio statute prohibiting award of nonpecuniary damages is controlling substantive state law). And if a jury's award exceeded those standards, the federal court would be required to reduce the verdict to bring it into compliance with the substantive law of New York. Here, New York law provides that a jury verdict may not exceed that amount which would "deviate[ ] materially from . . . reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995). This is the substantive rule provided by New York law. To disregard New York law in this case, in favor of the federal "shocks the conscience" standard, would violate the fundamental constitutional doctrine of *Erie*, 304 U.S. at 78.[8]

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[8] We recognize that, in cases where state and federal substantive standards differ, some courts have chosen to follow federal law. *See, e.g., Nodak Oil Co. v. Mobil Oil Corp.*, 533 F.2d 401, 410 (8th Cir. 1976). For the reasons stated in the text, we decline to follow this approach. No doubt it will sometimes be difficult to distinguish between procedural and substantive remittitur rules. Consider, for example, *American Business Interiors, Inc. v. Haworth, Inc.*, 798 F.2d 1135, 1146 (8th Cir. 1986), which applied federal remittitur rules in a diversity case where the forum state had abolished remittitur. It is difficult in the case of a state law doing away with remittitur to determine whether the rule is procedural or substantive. Such a rule presents itself as a procedural bar, but it has significant substantive ramifications. In contrast, New York's "deviates

This is substantially clarified by a more recent decision of the Supreme Court. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), involved a claim that a federal district court sitting in diversity had improperly failed to limit the size of a punitive damages award through remittitur. In that case, the Court reaffirmed the importance of applying federal procedural standards, but then made clear that "the propriety of an award of punitive damages . . . [is a] question[ ] of state law." *Id.* at 278. The Court expressly refused to "craft some common-law standard of excessiveness" since "these are matters of state, and not federal, common law." *Id.* at 279. As here, "[a]dopting a rule along the lines petitioners suggest would require us to ignore the distinction between the state-law and federal-law issues." *Id.* Hence, the *Browning-Ferris* Court approved the district court judge's application of "the proper state-law standard in considering whether the verdict returned was excessive." *Id.* at 280.

For purposes of deciding whether state or federal law is applicable, the question whether an award of *compensatory* damages exceeds what is permitted by law is not materially different from the question whether an award of *punitive* damages exceeds what is permitted by law. *Browning-Ferris* made clear that the excessiveness of punitive damages is governed by state, and not federal, law. The state's rule must also determine the excessiveness of compensatory damages.[9] Accordingly, we

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materially" standard is quite clearly a substantive rule governing the allowable size of jury verdicts.

[9] We note that, notwithstanding *Browning-Ferris*, a few courts have continued to apply federal standards of excessiveness in reviewing punitive damages. *See Mayer v. Gary Partners & Co. Ltd.*, 29 F.3d 330, 334 (7th Cir. 1994); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991); *The Post Office v. Portec, Inc.*, 913 F.2d 802, 809-10 (10th

decided in *Martell*, 748 F.2d at 750, that, when conducting remittitur review as a court sitting in diversity, we would seek the governing standard in state court decisions. We therefore reject the plaintiffs' argument and look to the law of New York to determine whether the award was excessive. Like a New York court, we will "look . . . to other jury awards condoned by the courts of" New York, recognizing that "New York appellate courts regard prior awards as not binding but instructive. *E.g.*, *Senko v. Fonda*, 53 A.D.2d 638, 639, 384 N.Y.S.2d 849, 851 (2d Dep't 1976) (prior awards 'may guide and enlighten the court[s]' 'in the exercise of their discretion.')." *Martell*, 748 F.2d at 750.

The standard for determining excessiveness and the appropriateness of remittitur in New York is somewhat ambiguous. Prior to 1986, New York law employed the same standard as the federal courts, *see Matthews v. CTI Container Transport Int'l Inc.*, 871 F.2d 270, 278 (2d Cir. 1989), which authorized remittitur only if the jury's verdict was so excessive that it "shocked the conscience of the court." *See, e.g.*, *Neal v. Rainbow House Fruits*, 447 N.Y.S.2d 487, 488 (App. Div. 1982); *Juiditta v. Bethlehem Steel Corp.*, 428 N.Y.S.2d 535, 543 (App. Div. 1980); *Petosa v. City of New York, Dep't of Sanitation*, 406 N.Y.S.2d 354, 355 (App. Div. 1978). In 1986, New York State legislated a new standard that required the Appellate Division of the Supreme Court to exercise

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Cir. 1990), *vacated and remanded*, 499 U.S. 915 (1991), *appeal dismissed per stipulation*, 935 F.2d 1105 (10th Cir. 1991). Some have avoided the issue by referring to both standards. *See Latham v. Nickerson American Plant Breeders*, 978 F.2d 1493, 1499 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 3037 (1993). Other courts have applied state standards of excessiveness. *See Hiltgen v. Sumrall*, 47 F.3d 695, 704 (5th Cir. 1995); *American Employers Ins. Co. v. Southern Seeding Servs., Inc.*, 931 F.2d 1453, 1458 (11th Cir. 1991). We do likewise.

closer control over jury awards. The new CPLR § 5501(c) provides,

> In reviewing a money judgment in an action in which an itemized verdict is required . . . in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate *if it deviates materially from what would be reasonable compensation.*

N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995) (emphasis added). This standard requires the reviewing court to determine the range it regards as reasonable, and to determine whether the particular jury award deviates materially from that range, taking corrective action if it does. Material deviation from reasonableness is less than that deviation required to find an award so excessive as to "shock the conscience."[10]

Because this statute makes explicit mention only of the Appellate Division, courts have expressed some confusion as to whether its standard applies also at the trial level. *See, e.g., In re Joint E. & S. Dists. Asbestos Litig.*, 798 F. Supp. 925, 936-37 (E. & S.D.N.Y. 1992) ("*McPadden et al.*"), *rev'd on other grounds*, 995 F.2d 343 (2d Cir.), *and rev'd on other grounds sub nom. Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993). *See also* David D. Siegal, *Supplementary Practice Com-*

[10] Decisions of New York State courts show that the two standards are different. *See Harvey v. Mazal Amer. Partners*, 581 N.Y.S.2d 639, 643 (1992) (remanding to Appellate Division for reconsideration of remittitur using proper "deviates materially" standard, where Appellate Division had referred to both standards); *Shurgan v. Tedesco*, 578 N.Y.S.2d 658, 659 (App. Div. 1992) (affirming trial court's additur where court set aside jury award as materially deviating from what would be reasonable compensation).

mentary, C5501:10, *reprinted in* McKinney's Consolidated Laws of New York Annotated, Vol. 7B at 5 (1995 Supp.). We need not resolve whether the "deviates materially" standard applies to trial courts as well as to the Appellate Division. Unquestionably, it provides the standard for appellate review and must therefore be applied by this court, regardless whether it also governed the district court sitting as a New York trial court.

Because the standard of excessiveness is furnished by state law, the best guide for a federal court, if available, would be decisions of the state's courts in comparable cases indicating at what point awards become excessive. *See Martell*, 748 F.2d at 750. Although a number of pertinent New York State judgments on damages for pain caused by mesothelioma were available, the district court relied instead on *McPadden*, a recent *federal* trial court decision. *Consorti et al.*, 847 F. Supp. at 1096-97. In *McPadden*, the district court upheld a jury award of $4.5 million for pain and suffering due to mesothelioma. *McPadden et al.*, 798 F. Supp. at 937-38.

In discussing below the question of excessiveness of the jury's award to Tabolt of $7.5 million for pain and suffering, Judge Sweet converted the $4.5 million *McPadden* award to a monthly figure of $409,090.91 for McPadden's 11 months of suffering. Multiplication of that figure by Tabolt's 18 months of suffering produced a figure of $7,363,636.36, which was not substantially lower than the jury's award to Tabolt. *Consorti et al.*, 847 F. Supp. at 1097. Although it was not expressly discussed, the district court presumably used the same conversion of the *McPadden* award to a monthly amount to justify the jury's $12 million award to Consorti, whose disease the jury predicted to run 32 months from onset to death. Twelve million expressed as a monthly figure

over 32 months is $375,000, which is below the $409,090.91 monthly figure Judge Sweet extrapolated from the *McPadden* judgment.

We disagree with the district court's use of *McPadden* to justify the jury's award to Consorti for two reasons. First, rigid application of a monthly multiplier for diseases of significantly different durations is an oversimplification, as well as inconsistent with New York precedent.[11] Unquestionably, the duration of suffering is a relevant factor. But it cannot be automatically assumed that suffering which lasts 30 months, from onset of illness to death, should command a verdict three times that of a case where ten months pass from onset to death. In many cases, the degree of average daily suffering will be greater in a case where the disease progresses rapidly. The fact that McPadden's disease progressed three times more rapidly than Consorti's does not necessarily justify an award for Consorti nearly three times the size of McPadden's. Moreover, we believe the court relied excessively on federal district court precedent to justify the jury verdict, giving insufficient regard to a large number of recent New York State court decisions which strongly indicated that the Consorti award was far beyond what New York law permits.

Justice Helen Freedman is the trial judge to whom all New York asbestos litigation has been assigned by administrative order. In the period shortly prior to the Consorti trial, Justice Freedman rendered numerous judgments reducing awards in comparable cases of mesothelioma to levels far below what the jury awarded to Consorti. In *Didner v. Keene Corp.*, Justice Freedman reduced a $3.25 million award to $2.3 million; the plain-

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[11] See discussion below at n.15.

tiff had suffered 26-27 months of pain and suffering due to mesothelioma. *Didner v. Keene Corp.*, N.Y.L.J., Jan. 4, 1991, at 22 (N.Y. Sup. Ct. Dec. 17, 1990), *aff'd*, 593 N.Y.S.2d 238 (App. Div. 1993) (no discussion of remittitur), *modified*, 604 N.Y.S.2d 884 (1993). The court concluded that while Didner's pain and suffering was severe, "courts in this jurisdiction have not countenanced awards of this size for two plus years of pain and suffering." *Id.*

Four months later, in the consolidated Brooklyn Navy Yard litigation, Justice Freedman reduced fourteen pain and suffering awards in mesothelioma death cases. *In re New York City Asbestos Litig.*, Index No. 40,000/88, slip. op. at 3-5 (N.Y. Sup. Ct. May 13, 1991), *aff'd in part, rev'd in part on other grounds*, 593 N.Y.S.2d 43 (App. Div. 1993) (no discussion of remittitur), *aff'd*, 605 N.Y.S.2d 3 (N.Y. 1993).[12] The jury awards for pain and suffering from mesothelioma that Justice Freedman considered ranged from a low of $1 million, for a course of disease that took only three months, to a high of $5 million, in a case of 34 months of suffering. The jury awards thus ranged from 8% to 42% of this jury's award to Consorti. Justice Freedman found all those awards excessive under New York law. Those most comparable in duration to Consorti's were two awards of $5 million in cases where the suffering lasted 34 and 35 months (*Cohen* and *Lopez*). Justice Freedman reduced these to $3 million. And as to three awards ranging from $3.2 to $4.25 million, for suffering periods of 26 to 29 months, they were reduced to $2.2 to $2.4 million (*Chierico*, *Savella*, and *Silver*).

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[12] Justice Freedman's published opinion at 572 N.Y.S.2d 1006, omits discussion of the specific remittiturs cited in the text.

While it is difficult, especially without a study of the complete record, to evaluate the pertinence of one judgment for pain and suffering for another, the strong pattern of Justice Freedman's rulings is helpful in evaluating the Consorti awards. In the face of so substantial a pattern of New York judgments communicating that New York courts find excessiveness in such cases at far lower levels, we believe it was error for the district court to conclude that the jury's $12 million award was within the range accepted by New York law.[13] We note furthermore that Justice Freedman employed the "shockingly excessive" standard, while we on appeal must use the standard of CPLR § 5501(c)—"deviates materially from . . . reasonable compensation"—a standard less deferential to the jury's appraisal.[14]

Although we recognize that John Consorti's suffering was very great, Justice Freedman's cases also all involved deaths from mesothelioma. It is not suggested to us that the suffering of the plaintiffs she considered was any less horrendous.[15] We recognize that the New

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[13] In *McPadden*, the district court observed that in the state court's Brooklyn Navy Yard consolidation, "Justice Freedman allowed several multimillion dollar awards for pain and suffering . . . ." *McPadden et al.*, 798 F. Supp. at 938. Those awards, reducing $5 million verdicts to $3 million, initially served as authority justifying an award of $4.5 million to McPadden, which in turn, converted to a monthly average figure, was used below to justify this award of $12 million.

[14] Although we apply the New York "deviates materially" standard, we note that Consorti's award was also so excessive as to "shock the conscience." Hence, we would remit this $12 million award for pain and suffering even if we were to follow federal law, although application of this standard might allow for a slightly higher award than the $3.5 million figure we have allowed.

[15] We note that one of the difficulties of remittitur review is the limited data available about the particular cases used for comparison. *See* David C. Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments*, 80 Iowa L. Rev. 825 (1995); Blumstein et al., *supra*. But even if

York decisions in question were at the trial court level, and thus less compelling as authority than a decision of New York's Court of Appeals. Nonetheless, especially given the uniformity of the large number of decisions, they provide a better indication of New York law than any other authorities cited to us.[16]

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we approach the New York precedents on a monthly basis—the way Judge Sweet used the *McPadden* precedent—they offer no better support for this award. Probably in recognition that the course of the disease will involve varying degrees of suffering in different periods, and that a short course is likely to cause greater average daily suffering than one which is slow to develop, Justice Freedman's judgments, stated on a monthly basis, vary roughly inversely to duration. The plaintiffs who died (or were expected to) within a year of the disease's onset received monthly sums of $110,000 to $200,000, while those whose illness lingered from one and a half to three years received between $80,000 and $90,000 per month. This provides no authority for Consorti's monthly figure of $375,000.

[16] In their petition for rehearing, plaintiffs cite two new authorities in support of the jury's verdict. In *Manning v. Georgia Pacific Corp.*, No. 102757/94 (N.Y. Sup. Ct. Feb. 3, 1995), Justice Freedman remitted a $5 million verdict for pain and suffering caused by mesothelioma to $4 million. The *Manning* decision does not alter our view of the problem. First, the reduction to $4 million does not differ significantly from our reduction to $3.5 million. Second, Justice Freedman, in raising the level of damages she considered acceptable, deferred to the very district court judgments (in *McPadden* and in this case) which we here criticize for insufficient deference to *her* earlier rulings.

Plaintiffs also point to a recent decision of New York's Appellate Division, 1st Department, *In re New York County DES Litigation*, 621 N.Y.S.2d 332 (App. Div. 1995). For several reasons, plaintiffs' submissions do not convince us to change our views of the present case. First, the Appellate Division's ruling gives no information about the verdict being upheld. It simply states, "As to damages, we do not find that there has been a material deviation from what would be reasonable compensation . . . for the unique, far-ranging and severe physical and psychological injuries suffered by these plaintiffs." *Id.* at 333 (citations omitted). The decision tells neither the amounts of the verdicts, nor what they were awarded for. Plaintiffs submit a newspaper article reporting the decision, which asserts that among the judgments affirmed were judgments for $12 million and $10 million. *DES Jury Verdicts Affirmed on Appeal*, N.Y.L.J., Jan. 19, 1995, at 1. Even this source, however, does

Given the consistent pattern, over a considerable number of cases of death by mesothelioma, of reduction of jury verdicts for pain and suffering by New York courts to figures ranging from approximately $1 million to a maximum of $3 million, we conclude an award exceeding $3.5 million would deviate materially from what is deemed reasonable under New York law. Accordingly, we direct entry of a conditional order of a new trial on the issue of damages for pain and suffering, unless plaintiffs accept remittitur to that amount.

C. *Counsel's Recommendation of an Award*

OCF claims that error occurred during summation, when plaintiffs' counsel made specific dollar recommendations to the jury as to appropriate awards for pain and suffering. He suggested $8 million for John Consorti's pain and suffering to date and $4 million for future pain and suffering. He also suggested a specific figure for Frances Consorti's award. After the jury left

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not tell us how those judgments were composed or what elements they included. What we do know from the opinion of the First Department is that the reviewing court considered the injuries to involve "far-ranging and severe physical and psychological injuries." *New York County DES Litigation*, 621 N.Y.S.2d at 333. Material from the briefs in the case tells us that these awards were made to women of childbearing age who—as a result of DES exposure—contracted clear cell adenocarcinoma of the vagina and other diseases. Their illnesses required that they receive radical surgery, which eliminated their reproductive capacity. The elements of suffering submitted to the jury included severe sexual dysfunction, aborted pregnancy, fear and sadness relating to the fate of unborn children, disappointment of plans to conceive a family, as well as many years of past and future suffering from cancer. The First Department's opinion states that it considers those injuries to be "unique."

In short, we have little guidance as to the exact nature of the verdicts upheld in the DES litigation, and the guidance we have tells us they involved quite different emotional considerations from those arising here. *See Nairn*, 837 F.2d at 568 (evaluating excessiveness by reference to other awards for similar injuries).

the room, defense counsel objected to plaintiffs' counsel's request.

OCF's protest is undermined by the fact that its own counsel was the first to suggest a value for Consorti's pain and suffering. Earlier in the summations, counsel for OCF told the jury:

> And I feel that to make a suggestion to you that he's not entitled to any compensation would not be fair. . . . [if you decide] that he was entitled to maybe $750,000 to maybe even a million dollars, I don't think that that would be an unfair figure.

While this court has not adopted a per se rule about the propriety of suggested damage amounts, *see McPadden et al.*, 798 F. Supp. at 936, we wish to emphasize that specifying target amounts for the jury to award is disfavored. Such suggestions anchor the jurors' expectations of a fair award at a place set by counsel, rather than by the evidence. *See Mileski v. Long Island R.R. Co.*, 499 F.2d 1169, 1172 (2d Cir. 1974) ("A jury with little or no experience in such matters, rather than rely upon its own estimates and reasoning, may give undue weight to the figures advanced by plaintiff's counsel . . . ."). A jury is likely to infer that counsel's choice of a particular number is backed by some authority or legal precedent. Specific proposals have a real potential to sway the jury unduly. While under the circumstances present here we do not yet reach the point of holding that it is error to permit such recommendations, it is not a desirable practice. We encourage trial judges to bar such recommendations.

D. *Comment by Judge*

As outlined above, after the jury returned its first verdict, the judge commented, among other things, that "you are probably the best jury that has ever been put together in the United States of America." After counsel objected, the judge gave a curative instruction. He told the jury that he had intended to praise "the way in which you have conducted yourself, not the verdict itself," and that he had no stake in their verdict.

OCF argues that the judge's comments impermissibly communicated to the jury his approval of their verdict. Judge Sweet immediately recognized that, coming on the heels of the generous verdict for Tabolt, his encouragement of the jury might be misunderstood as endorsement of the generosity of its verdict. His prompt corrective instruction cured the problem. There is no basis for a mistrial.

E. *Other Claims*

OCF asserts a number of other claims. OCF argues that the district court erred in failing to order a new trial due to the jury's receipt of extra-judicial information. A month after the jury returned its verdicts, the court received a letter from juror Carl D'Andrilli that said that during deliberations, another juror had mentioned "that Johns-Manville, a non-party defendant, possesses a one billion dollar fund to pay lawyer's fees to fight asbestos litigation cases." The district court ruled that any well-informed citizen could possess general knowledge about Johns-Manville and that the report from the juror was not prejudicial to the defendants. This ruling was certainly within the trial court's discretion.

The district court was also within its discretion in excluding the summary evidence proffered by OCF. OCF attempted to use summary evidence—analyzing Veteran and State invoices using a computer list of asbestos-containing products—to demonstrate that the Consorti family companies had purchased few asbestos-containing products from OCF. OCF did not introduce the computerized list or make it available in court or to counsel. The district court ruled that: "In the absence of the list and any testimony concerning its preparation, the summary based upon it became inadmissible." We agree. The records may not have comprised the universe of Veteran documents, and the reason for the exclusion of certain invoices from the summaries was unclear.

We reject OCF's claims that the evidence was insufficient to support the jury's findings that OCF acted recklessly and in concert with other defendants. The record contains sufficient evidence to support the jury's determination.

CONCLUSION

We have considered OCF's other claims and find them to be without merit. Based on the above, the verdict for John Consorti's pain and suffering will be set aside and a new trial ordered unless plaintiff-appellee agrees to accept an award of $3.5 million. The award for loss of consortium is vacated. The judgment of the district court is affirmed in all other respects.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 857—August Term, 1994

(Argued: November 14, 1994 Decided: August 28, 1995)

Docket No. 94-7501

JOHN CONSORTI & FRANCES CONSORTI,

Plaintiffs-Appellees,

—v.—

ARMSTRONG WORLD INDUSTRIES, INC., formerly known as Armstrong Cork Co.; COMBUSTION ENGINEERING, INC., et al.,

Defendants,

OWENS-CORNING FIBERGLAS CORP.,

Defendant-Appellant.

Before:

NEWMAN, *Chief Judge,*
ALTIMARI and LEVAL, *Circuit Judges.*

Appeal from the judgment of the United States District Court for the Southern District of New York (Robert W. Sweet, *Judge*) after a jury trial, awarding damages against an asbestos manufacturer for injuries caused by mesothelioma, an asbestos-related form of cancer. Defendant-appellant claims error as to several aspects of the trial, primarily consolidation of the cases of several plaintiffs, excessiveness of the award to John Consorti for pain and suffering, a recommendation by counsel to the jury as to the award amount, and the award to the spouse for loss of consortium.

Reversed and remanded for a new trial on the issue of damages for pain and suffering unless Consorti agrees to remit all damages in excess of $3.5 million. The determination of the spouse's consortium claim having been certified to the New York State Court of Appeals by previous order of this court, affirmed on all other claims.

STEVEN J. PHILLIPS, New York, N.Y., (Moshe Maimon, Robert I. Komitor, Alani Golanski, Levy Phillips & Konigsberg, New York, N.Y., Of Counsel), *Attorneys for Plaintiffs-Appellees.*

WILLIAM G. BALLAINE, New York, N.Y., (Mark S. Landman, Joanna L. Watman, Siff Rosen, New York, N.Y., Of Counsel), *Attorneys for Defendant-Appellant.*

LEVAL, *Circuit Judge*:

Owens-Corning Fiberglas Corporation ("OCF"), a fabricator of asbestos pipe-covering products, appeals from jury verdicts in favor of John Consorti, a pipe insulation worker who developed mesothelioma as the result of exposure to asbestos dust, and his wife Frances for loss of consortium. The trial in the Southern District of New York before Robert W. Sweet, *Judge*, which consumed 25 trial days, consolidated the claims of four plaintiff couples against numerous manufacturers of asbestos products. The jury rendered verdicts for the plaintiffs totalling in excess of $47 million. OCF's main claims on appeal are: (1) that the four cases should not have been consolidated; (2) that the $12 million award for John Consorti's pain and suffering was excessive; and (3) that Frances Consorti had no claim under New York law for loss of consortium because John's noxious exposure occurred prior to their marriage. OCF also challenges the sufficiency of evidence on various points, and numerous rulings made at trial.

We have certified the question of Mrs. Consorti's entitlement to sue for loss of consortium to the New York Court of Appeals. *Consorti v. Owens Corning Fiberglas Corp.*, 45 F.3d 48, 49 (2d Cir. 1995). We affirm on all other issues except the size of John Consorti's award for pain and suffering, which we believe was beyond what New York law permits.

BACKGROUND

A detailed account of the case is set forth in the district court's opinion in *In re New York Asbestos Litig.*, 847 F. Supp. 1086 (S.D.N.Y. 1994) ("*Consorti et al.*").

We include here only the facts necessary for the discussion below.

John Consorti ("Consorti") was a 40% owner of Veteran Pipe Covering, a family insulator business. He worked for Veteran as a pipe covering insulator from 1960 to 1963, and from 1970 to 1978. From 1963 to 1970, he worked as an insulator for another family business, State Pipe Covering. In 1978, he became Vice-President of Veteran, a position in which he remained until 1992. While working at these businesses, and at least through the mid-1970s, Consorti was exposed to asbestos products, including OCF's product.

Consorti began to suffer back problems in August 1991. In February 1992, he was diagnosed with pleural mesothelioma, an incurable cancer of the lining of the lung. He died after trial, at the age of 51, in November 1993.

Consorti initiated his asbestos personal injury action in August 1992 against numerous defendants in the Southern District of New York. His suit was one of the many thousands of asbestos cases reassigned by the Multi-District Litigation Panel to the Eastern District of Pennsylvania for discovery and pre-trial proceedings. Because of his rapidly advancing illness, his case was deemed an emergency "hardship" and was remanded to the Southern District of New York for expedited trial. It was consolidated for trial in 1993 with three other cases of mesothelioma due to asbestos exposure. *In re New York Asbestos Litig.*, 145 F.R.D. 644 (S.D.N.Y. 1993) ("*New York Asbestos I*"); *In re New York Asbestos Litig.*, 149 F.R.D. 490 (S.D.N.Y. 1993) ("*New York Asbestos II*"). OCF was a defendant only in the Consorti action.

OCF moved to sever the Consortis' case from the other plaintiffs, and the court denied the motion. *New York Asbestos II*, 149 F.R.D. at 491.

The trial of the consolidated action began on June 21, 1993. At trial, Consorti proved that his incurable fatal disease was caused by his ingestion and respiration of asbestos fibers. He demonstrated that he had endured enormous suffering from the mesothelioma and was likely to die within a few more months.

On July 22, 1993, after a five-week trial, the jury returned its first special verdict, awarding another plaintiff, Vincent Tabolt, over $13 million in damages, including $7.5 million for approximately 18 months of pain and suffering. After the jury announced the award, Judge Sweet, seeking to encourage the panel after its long days of hard work, said:

> You are probably the best jury that has ever been put together in the United States of America. You paid very close attention, you worked very hard. . . . Thank you very much for the good work you have done.

Outside the presence of the jury, OCF objected to the court's praise of the jury, arguing that the judge's remarks would be taken as approval of the enormous verdict and would influence the verdicts yet to be rendered. The following day, the court denied a motion for a mistrial, but gave a curative instruction:

> I wanted to be clear that since you have entered a verdict in one case that I was referring, of course, not to the verdict in any way, about which I have no control, that is entirely in your hands, but, rather, in the way in which you conducted yourselves . . . .

> It's the way in which you have conducted yourself, not the verdict itself.

The jury then deliberated on the Consorti case. In summation, plaintiffs' counsel had suggested awards of $8 million for John Consorti's past pain and suffering, plus $4 million for his future suffering. The jury returned a verdict that awarded exactly those amounts. The jury found John's remaining life expectancy to be nine months. OCF was found 7% responsible for Consorti's injuries.

OCF moved for judgment as a matter of law, a new trial, or a remittitur, all of which were denied. However, the court did conclude that the jury's calculation of Frances Consorti's future non-economic loss was against the weight of the evidence and must be set aside. *Consorti et al.*, 847 F. Supp. at 1105. In lieu of a new trial, the parties stipulated to an award for non-economic consortium of $332,000. The district court also reduced the verdict on economic damages for Frances's loss of future consortium to $750,000. *Id.* at 1106.

After judgment molding, the district court entered judgment against OCF for more than $11.5 million. *Id.* at 1086. This appeal followed.

DISCUSSION

OCF appeals numerous aspects of the case below and asks that the judgment be set aside or that remittitur be ordered.

A. *Consolidation*

Relying on a flawed understanding of our holding in *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346 (2d Cir.

1993), OCF contends that Judge Sweet erred in consolidating the cases of several plaintiffs into a single trial. OCF treats *Malcolm* as establishing a strong anti-consolidation bias. We take pains to emphasize that we have made no such suggestion. The reversal in *Malcolm* was attributable to factors unique to that case. We stressed that "[w]e do not wish to be understood as condemning all consolidations of asbestos cases." 995 F.2d at 354. In fact, after observing that the federal courts were "swamped with asbestos suits," 995 F.2d at 348, and that the " 'heyday of individual adjudication of asbestos mass tort lawsuits has long passed,' " *id.* (quoting *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 419 (J.P.M.L. 1991)), we indicated that another consolidation of a substantially larger number of asbestos cases coming from the Brooklyn Navy Yard (which were not appealed on that ground) would have passed muster. 995 F.2d at 353.

Consolidation is a valuable and important tool of judicial administration. This is especially true when the courts are overwhelmed with huge numbers of cases which involve substantially the same questions of fact, as happens when large numbers of plaintiffs allege that they have developed similar illnesses in reaction to a particular toxic substance. *See* Fed. R. Civ. P. 42(a). In such circumstances, consolidation permits the federal court to furnish trials in hundreds, even thousands of cases it might otherwise not reach for many years. If carefully and properly administered, as it was by Judge Sweet below, consolidation is also capable of producing, with efficiency and greatly reduced expense for all parties, a fairer, more rational and evenhanded delivery of justice.

We noted in *Malcolm* that at that time more than 200,000 asbestos cases had been filed in state and federal courts, with as many as 250,000 additional cases expected to come. 995 F.2d at 348. It requires little imagination to recognize that without consolidation the courts are simply incapable of handling litigation of such volume. The waste of time and expense involved in empaneling separate juries to decide the same sorts of questions over and over again is staggering. This is all the more true when one recognizes that each successive jury must be educated by expert witnesses to understand the toxicity of asbestos fibers, the etiology of asbestos-induced diseases, the state of the art regarding the industry's knowledge of these dangers through the years, and the economic issues involving loss of services and future income that recur so frequently in these cases.

Needless to say, efficiency cannot be permitted to prevail at the expense of justice. *Id.* at 350. The obligation of the courts to deliver justice is paramount, and it may not be scrapped for the benefit of cheaper and more rapid dispositions. *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir.), *cert. denied*, 498 U.S. 920 (1990). On the other hand, the judiciary, like every other institution, must be open to discarding habits that have outlived their usefulness, and must bend under the pressures of modern life to find greater efficiency in accomplishing its mission. When enormous savings of expense and gains of efficiency can be accomplished *without sacrifice of justice*, courts must be ready to alter their procedures. *See* American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* 16-18 (1994).

This is all the more true when increases in efficiency also *improve* the quality of the justice rendered. When

cases are properly chosen for consolidation and well administered, this will be the case. One of the most persistent and troublesome problems in the administration of justice in our civil jury system is the unpredictable relationship between different juries' awards, particularly for intangibles such as pain and suffering. It of course should be the goal of the overall administration of such litigation that more seriously injured plaintiffs receive higher compensation than those less seriously injured. However, when each case is tried before a different jury, the relationship between the size of one judgment for intangibles and another will be largely happenstance. When numerous claims are tried before a single jury, that jury will recognize that an important part of its chore is to scale the relative seriousness of the various plaintiffs' injuries and to see to it that their respective awards are consistent with that scaling.

Different juries also can produce inconsistent verdicts on liability and the extent of responsibility. This may be encouraged by counsel's litigation strategy. When only a small segment of a much larger picture is before the jury, counsel can present a deceptive view of the relative responsibility of various actors—especially entities that are absent from the trial. This becomes far more difficult when the jury is considering a broader spectrum of information and more of the relevant actors are present defending their positions. *See* Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. Pa. L. Rev. 7, 15 (1986) ("Beyond the sheer economy of not having to litigate the same matters twice, consolidation . . . can reduce such problems as inconsistent outcomes, whipsawing (from the ability of defendants in separate litigations to point to a nonparty as the one truly liable),

and uncoordinated scrambles for the assets of a limited fund.") (footnotes omitted).

Furthermore, no logic supports the proposition that the incremental addition of similar cases will reduce the jury's ability to understand and resolve the issues placed before it. Without doubt, consideration of a single toxic tort case is challenging, requiring jurors to grapple with complicated issues of chemistry and medicine. But it does not follow that the jury will be less able to deal with those issues if the same questions are repeatedly put to it over a substantially longer period of time. Quite to the contrary, if a jury spends many weeks, or many months, considering numerous cases of asbestos disease, and repetitively hears the disputes of experts and the arguments of counsel on case after case, that jury is likely to develop a far deeper understanding of the issues than a jury whose exposure to those complicated questions is brief, and requires answering only a single set of questions.

Malcolm suggests nothing to the contrary. The majority in *Malcolm*, over Judge Walker's dissent, found various case-specific problems that led it to the conclusion that justice had been sacrificed. A principal problem identified in *Malcolm* was that the very basis of consolidation was found to be inapplicable to the case. The consolidation was premised on the supposed fact that each plaintiff had spent more than 50% of his work history at one or more of 40-odd power plant construction sites in New York State. *Malcolm*, 995 F.2d at 351. At trial, however, it emerged that several plaintiffs had spent only small fractions of their exposure history at power plant sites, and the jury in fact had before it evidence of over 250 work sites with varying product mixes. *Id.* Another problem was that 13 days before

trial, over 200 companies had been impleaded as third-party defendants, and some of them in turn impleaded fourth-party defendants. *Id.* at 348. The court expressly queried whether these late-added parties had adequate opportunity to prepare for trial. *Id.* at 352. The most critical problem undermining the *Malcolm* consolidated verdict was the majority's perception that, instead of apportioning responsibility on the basis of the evidence, the jury had simply "throw[n] up its hands," *id.*, and apportioned "an equal 9% liability to each defendant," *id.*, in spite of the fact that "the evidence regarding [plaintiffs'] exposure to [the defendant's] products was vague, minimal, and heavily circumstantial when compared to the extensive evidence regarding the products of [another defendant] . . . ." *Id.*

OCF argues that some of the factors we listed in *Johnson*, 899 F.2d at 1285, and *Malcolm*, 995 F.2d at 350-51, as helpful in analyzing the propriety of consolidation, weigh against consolidation here. Prior to trial, Judge Sweet entertained a reconsideration of consolidation in light of our newly-issued *Malcolm* decision. He reviewed those factors carefully and adhered to his decision that consolidation was proper. *New York Asbestos II*, 149 F.R.D. at 499. It is important to remember that factors noted by a court as helpful in analyzing a particular question are no more than that; they are not a substitute for answering the question itself. When the issue for an appellate court is whether the trial court's decision to consolidate exceeded its discretion, the question remains whether the consolidation caused such confusion or prejudice as to render the jury incapable of finding the facts on the basis of the evidence. It is clear the consolidation here had no such consequence.

Furthermore, we have noted repeatedly that a district court can greatly assist a jury in comprehending complex evidence through the use of intelligent management devices. *See, e.g., Johnson*, 899 F.2d at 1285; *Malcolm*, 995 F.2d at 349, 352-53. Such management devices include organizing evidence by topic, using charts and visual aids, allowing note-taking by jurors, furnishing the jury with notebooks and albums of pertinent exhibits structured in a manner to help it master complex materials, interim explanations by the judge on issues of law and fact and on the limited use of evidence, interim addresses to the jury by counsel,[1] and questionnaires and special verdict forms to help the jury approach deliberations in a well-organized fashion.

Judge Sweet took numerous such steps to help the jury segregate the issues before it and distinguish among the four sets of plaintiffs and the various defendants. The jury was provided specialized notebooks with a photograph of each plaintiff, accompanied by undisputed biographical information. Jurors were encouraged to take extensive notes during trial. During opening statements and summations, counsel used charts to help the jury distinguish among the plaintiffs' exposure histories, together with time lines to help the jury differentiate between relevant periods in the state of the art. Counsel also provided citations to the trial record to help guide the jury to arguments regarding specific evidence. *Consorti, et al.*, 847 F. Supp. at 1093. Throughout the trial, Judge Sweet gave numerous cautionary and limiting instructions to assist the jury in its understanding of the bearing of the evidence on the various cases. The verdict forms which Judge Sweet prepared guided the jury step

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[1] *See* Pierre N. Leval, *From the Bench: Westmoreland v. CBS*, Litigation, Fall 1985, at 7, 66.

by step through the various issues it needed to consider and resolve. The jury was encouraged to consider each case separately.

By implementing such measures, Judge Sweet insured that plaintiffs and defendants received a trial by jury that fairly addressed the individual claims while effectively managing the resources of the court and giving the parties the benefit of an efficient and economical trial. We have no reason to believe that the consolidation prevented the jury from rendering verdicts based on the evidence as it related to each independent claim. OCF's contention of improper consolidation is without merit.

B. *Excessiveness of Award for Pain and Suffering*

OCF claims that the award to John Consorti of $12 million for his pain and suffering was excessive and should be set aside. We agree.

1. *The Role of Judge and Jury*

We note at the start, our finding in no way deprecates the enormous suffering that John Consorti endured. He developed a tumor which gradually enveloped his spine. The tumor pressed against his vocal cords, causing him to lose his voice and choke. It interfered with eating, swallowing, even breathing. His circulatory system was impaired, causing painful and disfiguring swelling of his head and neck. And, as his disease progressed, it became increasingly difficult (later impossible) for him to walk or to care for himself. His pain grew worse as time passed, and was, of course, deepened by the certainty of imminent death. We take it as a given that reasonable people of his age, in good mental and physical health, would not have traded one-quarter of his suffering for a hundred million dollars, much less twelve.

It does not follow that courts should permit a verdict of a hundred million dollars, or twelve million, to stand. While the law seeks by reasonable compensation to make a plaintiff whole, we must recognize that compensation for suffering can be accomplished only in a symbolic and arbitrary fashion. There are at least two serious shortcomings to the endeavor. First, money awards do not make one whole; they do not alleviate pain. Second, there is no rational scale that justifies the award of any particular amount, as opposed to some very different amount, in compensation for a particular quantum of pain. *See Gibbs v. United States*, 599 F.2d 36, 39 (2d Cir. 1979) ("measuring pain and suffering in dollars is inescapably subjective"); 2 American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury* 201-02 (1991).[2]

We acknowledge furthermore that a judge's training in law gives the judge no greater ability than a jury to determine the dollar amount that appropriately compensates any particular level of suffering. *See* 2 American Law Institute, *supra*, at 202. This recognition can lead judges to abdicate responsibility for review of jury verdicts. As we have no greater knowledge than jurors of the amount of money that suitably compensates for suffering, the question arises why our assessment should take precedence over theirs?

Nonetheless, there are important reasons why courts cannot properly leave it to juries to set the limits of compensation for such injuries. Even where the law is inca-

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[2] Juries may be especially inclined to make substantial awards when they believe that the defendant's liability is covered by insurance. While insurance frequently does cover the liability, jurors may neglect to consider the broader effect of their award on insurance premiums. *See* W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* 591 (5th ed. 1984).

pable of furnishing a rational answer, it seeks at least to be evenhanded, fair, and predictable. It should be our goal that persons who endure a similar degree of suffering can expect to receive a roughly similar award of compensation, *see Nairn v. Nat'l R.R. Passenger Corp.*, 837 F.2d 565, 568 (2d Cir. 1988) (vacating a damages award as excessive in light of awards for similar injuries in other cases), and that similarly situated defendants be burdened by similar judgments. If each jury is given unbridled authority to set the level of damages, awards will vary widely and unpredictably. Great discrepancies in awards destroy the fairness of the judicial system, as well as the predictability of litigation. This vigilance must be directed not only against awards that are too high, but also against those that are too low. *See, e.g., In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853-54 (2d Cir. 1992) (ordering new trial on issue of pain and suffering where award of $25,000 was so low, given evidence of lengthy and intense suffering, as to shock the conscience). Such goals cannot be achieved unless courts exercise responsibility to keep jury awards within limits. *Cf. Restatement (Second) of Torts* § 901 (1977) (note) (describing rules for determining damage awards); Fowler V. Harper et al., *The Law of Torts* 250-51 (2d ed. 1985) (describing judge's role in fashioning tort damages).

The unpredictability of jury awards is pernicious not only because it is unfair. Widely varying jury verdicts make it difficult for risk bearers to structure their behavior to efficiently manage risk. While it is an aim of tort law to deter wrongful conduct, *see Restatement (Second) of Torts* § 901 (1977), at the same time tort law seeks to avoid over-deterrence that would stifle socially valuable enterprise.

> Where liability costs are relatively predictable, they can be avoided (where it is efficient to do so) or 'built in' to the costs of goods and services. . . . But errors in valuation may cause over-deterrence—the taking of too many costly precautions, or withdrawal from risky activity altogether. For example, during the liability insurance crisis of the 1980s, many obstetricians reportedly stopped delivering babies, and some manufacturers ceased development or production of certain drugs and goods.

Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 Nw. U. L. Rev. 908, 925 (1989) (citations omitted). *See also* Peter H. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* 289 (1987) (arguing that "individual juries acting in isolated tort cases . . . seem especially prone to overdeter some risky activities," thereby "discourag[ing] the taking of risks from which society might well benefit"); Peter H. Schuck, Introduction to *Tort Law and the Public Interest* 31-36 (Peter H. Schuck ed. 1991) (describing empirical research); 2 American Law Institute, *supra*, at 202-03. When courts fail to exercise the responsibility to curb excessive verdicts, the effects are uncertainty and an upward spiral. One excessive verdict, permitted to stand, becomes precedent for another still larger one.[3] Unbridled, spiraling, excessive judgments predictably impose huge costs on society.

A failure by courts to impose limits on jury verdicts would cause serious social dislocation. At the first level, unchecked costs attributable to tort liability, and resultant increases in insurance premiums, would inevitably raise the price of goods and services to the public. More

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[3] See discussion below at n.9.

serious exaggeration in unchecked jury awards can cause bankruptcies in productive enterprises, with consequent disappearance of jobs, and even bankruptcies among insurers, leaving segments of society unprotected. Finally, in the circumstance represented by asbestos litigation, where it appears virtually certain that the resources of major defendants will eventually be completely consumed by their liabilities, allowing excessive awards to stand in the early stages of the litigation of the many thousands of cases they face will mean that overcompensation of the early plaintiffs will leave insufficient resources for the equally deserving plaintiffs whose cases are heard later.[4]

For all these reasons, even if courts have no better ability than jurors to measure the dollar value of pain, they must accept the responsibility of controlling the limits of jury awards. *See generally* David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256 (1989) (advocating increased judicial supervision of jury awards for pain and suffering prior to death).[5]

2. *The Award for Consorti's Pain and Suffering*

The first step in deciding whether the award of $12 million for John Consorti's pain and suffering is exces-

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[4] For example, Keene Corporation informed the trial court that it had already spent over $430 million to resolve 95,000 claims, with 98,000 others still pending; it had no further insurance coverage, and would "run out of funds long before all of the present claimants have been even partially compensated." Keene advised the court, "[T]here is no hope that those who filed late claims or who file claims in the future will receive any compensation." *New York Asbestos II*, 149 F.R.D. at 499-500.

[5] We note that in the punitive damages context, the Supreme Court has held the availability of judicial review over jury awards to be constitutionally required. *See Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331, 2340-41 (1994).

sive must be to ascertain the governing standard of law. Because in a diversity action the district court applies the substantive law of the state in which it sits, New York law will govern. *See Martell v. Boardwalk Enters., Inc.*, 748 F.2d 740, 750 (2d Cir. 1984); *Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 650 (2d Cir. 1994).

The standard for determining excessiveness and the appropriateness of remittitur in New York is somewhat ambiguous. Prior to 1986, New York law employed the same standard as the federal courts, *see Matthews v. CTI Container Transport Int'l Inc.*, 871 F.2d 270, 278 (2d Cir. 1989), which authorized remittitur only if the jury's verdict was so excessive that it "shocked the conscience of the court." *See, e.g., Neal v. Rainbow House Fruits*, 447 N.Y.S.2d 487, 488 (App. Div. 1982); *Juiditta v. Bethlehem Steel Corp.*, 428 N.Y.S.2d 535, 543 (App. Div. 1980); *Petosa v. City of New York, Dep't of Sanitation*, 406 N.Y.S.2d 354, 355 (App. Div. 1978). In 1986, New York State legislated a new standard that required the Appellate Division of the Supreme Court to exercise closer control over jury awards. The new CPLR § 5501(c) provides,

> In reviewing a money judgment in an action in which an itemized verdict is required . . . in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate *if it deviates materially from what would be reasonable compensation.*

N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995) (emphasis added). This standard requires the reviewing court to determine the range it regards as rea-

sonable, and to determine whether the particular jury award deviates materially from that range, taking corrective action if it does. Material deviation from reasonableness is less than that deviation required to find an award so excessive as to "shock the conscience."[6]

Because this statute makes explicit mention only of the Appellate Division, courts have expressed some confusion as to whether its standard applies also at the trial level. *See, e.g., In re Joint E. & S. Dists. Asbestos Litig.*, 798 F. Supp. 925, 936-37 (E. & S.D.N.Y. 1992) ("*McPadden et al.*"), *rev'd on other grounds*, 995 F.2d 343 (2d Cir.), *and rev'd on other grounds sub nom. Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993). *See also* David D. Siegal, *Supplementary Practice Commentary*, C5501:10, *reprinted in* McKinney's Consolidated Laws of New York Annotated, Vol. 7B at 5 (1995 Supp.). We need not resolve whether the "deviates materially" standard applies to trial courts as well as to the Appellate Division. Unquestionably, it provides the standard for appellate review and must therefore be applied by this court, regardless whether it also governed the district court sitting as a New York trial court.

Because the standard of excessiveness is furnished by state law, the best guide for a federal court, if available, would be decisions of the state's courts in comparable cases indicating at what point awards become excessive. *See Martell*, 748 F.2d at 750. Although a number of per-

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[6] Decisions of New York State courts show that the two standards are different. *See Harvey v. Mazal Amer. Partners*, 581 N.Y.S.2d 639, 643 (1992) (remanding to Appellate Division for reconsideration of remittitur using proper "deviates materially" standard, where Appellate Division had referred to both standards); *Shurgan v. Tedesco*, 578 N.Y.S.2d 658, 659 (App. Div. 1992) (affirming trial court's additur where court set aside jury award as materially deviating from what would be reasonable compensation).

tinent New York State judgments on damages for pain caused by mesothelioma were available, the district court relied instead on *McPadden*, a recent *federal* trial court decision. *Consorti et al.*, 847 F. Supp. at 1096-97. In *McPadden*, the district court upheld a jury award of $4.5 million for pain and suffering due to mesothelioma. *McPadden et al.*, 798 F. Supp. at 937-38.

In discussing below the question of excessiveness of the jury's award to Tabolt of $7.5 million for pain and suffering, Judge Sweet converted the $4.5 million *McPadden* award to a monthly figure of $409,090.91 for McPadden's 11 months of suffering. Multiplication of that figure by Tabolt's 18 months of suffering produced a figure of $7,363,636.36, which was not substantially lower than the jury's award to Tabolt. *Consorti et al.*, 847 F. Supp. at 1097. Although it was not expressly discussed, the district court presumably used the same conversion of the *McPadden* award to a monthly amount to justify the jury's $12 million award to Consorti, whose disease the jury predicted to run 32 months from onset to death. Twelve million expressed as a monthly figure over 32 months is $375,000, which is below the $409,090.91 monthly figure Judge Sweet extrapolated from the *McPadden* judgment.

We disagree with the district court's use of *McPadden* to justify the jury's award to Consorti for two reasons. First, rigid application of a monthly multiplier for diseases of significantly different durations is an oversimplification, as well as inconsistent with New York precedent.[7] Unquestionably, the duration of suffering is a relevant factor. But it cannot be automatically assumed that suffering which lasts 30 months, from onset of ill-

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[7] See discussion below at n.10.

ness to death, should command a verdict three times that of a case where ten months pass from onset to death. In many cases, the degree of average daily suffering will be greater in a case where the disease progresses rapidly. The fact that McPadden's disease progressed three times more rapidly than Consorti's does not necessarily justify an award for Consorti nearly three times the size of McPadden's. Moreover, we believe the court relied excessively on federal district court precedent to justify the jury verdict, giving insufficient regard to a large number of recent New York State court decisions which strongly indicated that the Consorti award was far beyond what New York law permits.

Justice Helen Freedman is the trial judge to whom all New York asbestos litigation has been assigned by administrative order. In the period shortly prior to the Consorti trial, Justice Freedman rendered numerous judgments reducing awards in comparable cases of mesothelioma to levels far below what the jury awarded to Consorti. In *Didner v. Keene Corp.*, Justice Freedman reduced a $3.25 million award to $2.3 million; the plaintiff had suffered 26-27 months of pain and suffering due to mesothelioma. *Didner v. Keene Corp.*, N.Y.L.J., Jan. 4, 1991, at 22 (N.Y. Sup. Ct. Dec. 17, 1990), *aff'd*, 593 N.Y.S.2d 238 (App. Div. 1993) (no discussion of remittitur), *modified*, 604 N.Y.S.2d 884 (1993). The court concluded that while Didner's pain and suffering was severe, "courts in this jurisdiction have not countenanced awards of this size for two plus years of pain and suffering." *Id.*

Four months later, in the consolidated Brooklyn Navy Yard litigation, Justice Freedman reduced fourteen pain and suffering awards in mesothelioma death cases. *In re New York City Asbestos Litig.*, Index No. 40,000/88, slip.

op. at 3-5 (N.Y. Sup. Ct. May 13, 1991), *aff'd in part, rev'd in part on other grounds*, 593 N.Y.S.2d 43 (App. Div. 1993) (no discussion of remittitur), *aff'd*, 605 N.Y.S.2d 3 (N.Y. 1993).[8] The jury awards for pain and suffering from mesothelioma that Justice Freedman considered ranged from a low of $1 million, for a course of disease that took only three months, to a high of $5 million, in a case of 34 months of suffering. The jury awards thus ranged from 8% to 42% of this jury's award to Consorti. Justice Freedman found all those awards excessive under New York law. Those most comparable in duration to Consorti's were two awards of $5 million in cases where the suffering lasted 34 and 35 months (*Cohen* and *Lopez*). Justice Freedman reduced these to $3 million. And as to three awards ranging from $3.2 to $4.25 million, for suffering periods of 26 to 29 months, they were reduced to $2.2 to $2.4 million (*Chierico*, *Savella*, and *Silver*).

While it is difficult, especially without a study of the complete record, to evaluate the pertinence of one judgment for pain and suffering for another, the strong pattern of Justice Freedman's rulings is helpful in evaluating the Consorti awards. In the face of so substantial a pattern of New York judgments communicating that New York courts find excessiveness in such cases at far lower levels, we believe it was error for the district court to conclude that the jury's $12 million award was within the range accepted by New York law.[9]

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[8] Justice Freedman's published opinion at 572 N.Y.S.2d 1006, omits discussion of the specific remittiturs cited in the text.

[9] In *McPadden*, the district court observed that in the state court's Brooklyn Navy Yard consolidation, "Justice Freedman allowed several multimillion dollar awards for pain and suffering . . . ." *McPadden et al.*, 798 F. Supp. at 938. Those awards, reducing $5 million verdicts to $3 million, initially served as authority justifying an award of $4.5 mil-

We note furthermore that Justice Freedman employed the "shockingly excessive" standard, while we on appeal must use the standard of CPLR § 5501(c)—"deviates materially from . . . reasonable compensation"—a standard less deferential to the jury's appraisal.

Although we recognize that John Consorti's suffering was very great, Justice Freedman's cases also all involved deaths from mesothelioma. It is not suggested to us that the suffering of the plaintiffs she considered was any less horrendous.[10] We recognize that the New York decisions in question were at the trial court level, and thus less compelling as authority than a decision of New York's Court of Appeals. Nonetheless, especially given the uniformity of the large number of decisions, they provide a better indication of New York law than any other authorities cited to us.

Given the consistent pattern, over a considerable number of cases of death by mesothelioma, of reduction of jury verdicts for pain and suffering by New York courts to figures ranging from approximately $1 million to a

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lion to McPadden, which in turn, converted to a monthly average figure, was used below to justify this award of $12 million.

[10] We note that one of the difficulties of remittitur review is the limited data available about the particular cases used for comparison. *See* David C. Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments*, 80 Iowa L. Rev. 825 (1995). But even if we approach the New York precedents on a monthly basis—the way Judge Sweet used the *McPadden* precedent—they offer no better support for this award. Probably in recognition that the course of the disease will involve varying degrees of suffering in different periods, and that a short course is likely to cause greater average daily suffering than one which is slow to develop, Justice Freedman's judgments, stated on a monthly basis, vary roughly inversely to duration. The plaintiffs who died (or were expected to) within a year of the disease's onset received monthly sums of $110,000 to $200,000, while those whose illness lingered from one and a half to three years received between $80,000 and $90,000 per month. This provides no authority for Consorti's monthly figure of $375,000.

maximum of $3 million, we conclude an award exceeding $3.5 million would deviate materially from what is deemed reasonable under New York law. Accordingly, we direct entry of a conditional order of a new trial on the issue of damages for pain and suffering, unless plaintiffs accept remittitur to that amount.

C. *Counsel's Recommendation of an Award*

OCF claims that error occurred during summation, when plaintiffs' counsel made specific dollar recommendations to the jury as to appropriate awards for pain and suffering. He suggested $8 million for John Consorti's pain and suffering to date and $4 million for future pain and suffering. He also suggested a specific figure for Frances Consorti's award. After the jury left the room, defense counsel objected to plaintiffs' counsel's request.

OCF's protest is undermined by the fact that its own counsel was the first to suggest a value for Consorti's pain and suffering. Earlier in the summations, counsel for OCF told the jury:

> And I feel that to make a suggestion to you that he's not entitled to any compensation would not be fair. . . . [if you decide] that he was entitled to maybe $750,000 to maybe even a million dollars, I don't think that that would be an unfair figure.

While this court has not adopted a per se rule about the propriety of suggested damage amounts, *see McPadden et al.*, 798 F. Supp. at 936, we wish to emphasize that specifying target amounts for the jury to award is disfavored. Such suggestions anchor the jurors' expectations of a fair award at a place set by counsel, rather than by the evidence. *See Mileski v. Long Island R.R.*

Co., 499 F.2d 1169, 1172 (2d Cir. 1974) ("A jury with little or no experience in such matters, rather than rely upon its own estimates and reasoning, may give undue weight to the figures advanced by plaintiff's counsel . . . ."). A jury is likely to infer that counsel's choice of a particular number is backed by some authority or legal precedent. Specific proposals have a real potential to sway the jury unduly. While under the circumstances present here we do not yet reach the point of holding that it is error to permit such recommendations, it is not a desirable practice. We encourage trial judges to bar such recommendations.

D. *Comment by Judge*

As outlined above, after the jury returned its first verdict, the judge commented, among other things, that "you are probably the best jury that has ever been put together in the United States of America." After counsel objected, the judge gave a curative instruction. He told the jury that he had intended to praise "the way in which you have conducted yourself, not the verdict itself," and that he had no stake in their verdict.

OCF argues that the judge's comments impermissibly communicated to the jury his approval of their verdict. Judge Sweet immediately recognized that, coming on the heels of the generous verdict for Tabolt, his encouragement of the jury might be misunderstood as endorsement of the generosity of its verdict. His prompt corrective instruction cured the problem. There is no basis for a mistrial.

E. *Other Claims*

OCF asserts a number of other claims. OCF argues that the district court erred in failing to order a new trial due to the jury's receipt of extra-judicial information. A month after the jury returned its verdicts, the court received a letter from juror Carl D'Andrilli that said that during deliberations, another juror had mentioned "that Johns-Manville, a non-party defendant, possesses a one billion dollar fund to pay lawyer's fees to fight asbestos litigation cases." The district court ruled that any well-informed citizen could possess general knowledge about Johns-Manville and that the report from the juror was not prejudicial to the defendants. This ruling was certainly within the trial court's discretion.

The district court was also within its discretion in excluding the summary evidence proffered by OCF. OCF attempted to use summary evidence—analyzing Veteran and State invoices using a computer list of asbestos-containing products—to demonstrate that the Consorti family companies had purchased few asbestos-containing products from OCF. OCF did not introduce the computerized list or make it available in court or to counsel. The district court ruled that: "In the absence of the list and any testimony concerning its preparation, the summary based upon it became inadmissible." We agree. The records may not have comprised the universe of Veteran documents, and the reason for the exclusion of certain invoices from the summaries was unclear.

We reject OCF's claims that the evidence was insufficient to support the jury's findings that OCF acted recklessly and in concert with other defendants. The record contains sufficient evidence to support the jury's determination.

CONCLUSION

We have considered OCF's other claims and find them to be without merit. Based on the above, the verdict for John Consorti's pain and suffering will be set aside and a new trial ordered unless plaintiff-appellee agrees to accept an award of $3.5 million. The determination of the consortium claim awaits the decision of the New York State Court of Appeals.

Our partial mandate will issue on all questions covered by this opinion. Upon our receipt of the answer of the New York Court of Appeals to the certified question, we will file a further decision, and a further mandate will issue.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 94-7501
Filed December 22, 1995

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of December, one thousand nine hundred and ninety-five.

PRESENT: HON. JON O. NEWMAN,
Chief Judge,
HON. FRANK X. ALTIMARI
HON. PIERRE N. LEVAL,
Circuit Judges.

JOHN CONSORTI & FRANCES CONSORTI,

Plaintiffs-Appellees,

—v.—

ARMSTRONG WORLD INDUSTRIES, INC., formerly known as Armstrong Cork Co.; COMBUSTION ENGINEERING, INC.; OWENS-ILLINOIS, INC.; NATIONAL GYPSUM CO.; UNITED STATES GYPSUM CO.; J.P. STEVENS & CO., INC.; KEENE CGRPORATION; THE FLINTKOTE CO.; FIBREBOARD CORPORATION; EMPIRE ACE INSULATION CORP.; ROCKWOOL MANUFACTURING CO.; TURNER & NEWALL; ATLAS TURNER, INC.; BORDEN, INC.; CERTAINTEED CORPORATION; RYDER INDUSTRIES; GREAT LAKES TEXTILE, INC.; PITTSBURGH-CORNING; ROBERT A. KEASBEY COMPANY; DUREX DISTRIBUTORS, INC.; W.R. GRACE

COMPANY; U.S. RUBBER CO., also known as Uniroyal, Inc.; CROWN & CORK SEAL CO., INC.; VIMASCO CORPORATION; NEW YORK TWINE CO.; CHILDRES PRODUCTS COMPANY, INC.; GENERAL DYNAMICS CORPORATION; EASTERN REFRACTORIES COMPANY, INC.; CLOWES PROTECTIVE COATINGS, INC.; RICHMOND ASBESTOS CO., INC.; ASBESTONE CORP.; CHARLES PRODUCT COMPANY; S.W. ANDERSON SALES CORPORATION; AMERICAN PRODUCTS, INC.; UNION CARBIDE CORP.; MONSEY PRODUCTS COMPANY; UNITED STATES OF AMERICA; NORRISTOWN MAGNESIA AND ASBESTOS COMPANY; PORTER-HAYDEN CO.; STARR DAVIS CO., INC; WITCO CHEMICAL CO.; CONSOLIDATED EDISON; STANDARD ASBESTOS CO.; EPOLUX MFG., CORP.; B.F. GOODRICH COMPANY; INSULATION SALES CORP.; TOSCO CORP.; CHAS. HARMON & CO., INC.; H. ZARIN TEXTILES CORP.; MONSANTO; TEXTILE BY-PRODUCTS CORP.; SKIRGES CORP.; H.B. FULLER CO.; LOUIS HALPRIN & SONS; CONSOLIDATED PROTECTIVE COATINGS CORP.; CONSOLIDATED GOOD YEAR; IAF INTERNATIONAL, LTD.; GAF CORPORATION; ANCHOR PACKING COMPANY; C.E. THURSTON & SONS, INC.; A.P. GREENE INDUSTRIES, INC.; GEORGIA PACIFIC, INC.; DANA INC.; UNIRORAL INC.,

Defendants,

OWENS-CORNING FIBERGLAS CORP.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is affirmed in part, reversed in part, vacated in part and remanded to the said district court for further proceedings consistent with the opinion of this Court.

For the Court
GEORGE LANGE III, Clerk

By: ARTHUR M. HELLER
Arthur M. Heller
Administrative Attorney

UNITED STATES DISTRICT COURT
S.D. NEW YORK

Nos. 92 Civ. 6377 (RWS), 92 Civ. 7283 (RWS),
92 Civ. 2402 (RWS) and 92 Civ. 0763 (RWS)

Jan. 21, 1994

In re NEW YORK ASBESTOS LITIGATION.

John Consorti, Alfred Luchnick, Peter Pulizzi,
Vincent Tabolt,

Plaintiffs.

Opinion Granting Reargument in Part and Denying it in Part Feb. 18, 1994.

Levy Phillips & Konigsberg, New York City (Robert I. Komitor, Moishe Maimon, of counsel), for plaintiffs.

McCarter & English, Newark, NJ by Richard P. O'Leary, for defendant Keene Corp.

Flemming, Zulack & Williamson, New York City (Cynthia B. Rubin, of counsel), for defendant Flintkote Co.

Hinckley & Silbert, P.C., New York City (Craig F. Wilson, of counsel), for defendant Owens-Corning Fiberglas Corp.

Gladstein & Isaac, New York City (Peter L. Herb, of counsel), for defendant Veteran's Pipe Covering.

Lester Schwab Katz & Dwyer, New York City (Cynthia Weiss Antonucci, of counsel), for defendant Fibreboard Corp.

Winick & Rich, P.C., New York City (Abraham Y. Skoff, of counsel), for defendant Atlas Turner, Inc.

Anderson Kill Olick & Oshinsky, P.C., New York City, and Whiteford, Taylor & Preston, Baltimore, MD (Warren Weaver, Jennifer W. Darger, Margaret A. Weiner, of counsel), for defendant Porter Hayden Co.

OPINION

SWEET, District Judge.

After twenty-five days of trial, the jury in this consolidated trial reached special verdicts awarding over $47 million in damages on behalf of plaintiffs John and Sharon Tabolt, John and Francis Consorti, Alfred and Joselyn Luchnick, and Peter and Anne Pulizzi against six defending corporations and a number of other settling and non-party defendants. These verdicts are annexed as Appendix A (*Tabolt*), B (*Consorti*), C (*Luchnick*) and D (*Pulizzi*) and were the subject of post trial motions of the defendants which are granted in part and denied in part as set forth below. The order of the dispositions will follow the order of the verdicts which were rendered. In addition, a number of issues are common to certain of the cases and will be dealt with as they arise. Those relating to the molding of judgments will be resolved after the consideration of particular verdicts.

Prior Proceedings

The procedural path that these cases followed from their filing to their eventual consolidation for trial in this Court is fully recounted in prior opinions, familiarity with which is

assumed. *See In re New York Asbestos Litig.*, 149 F.R.D. 490 (S.D.N.Y. 1993); *In re New York Asbestos Litig.*, 145 F.R.D. 644 (S.D.N.Y.1993). These cases were consolidated for trial by order and opinion of this Court dated February 12, 1993. *See In re New York Asbestos Litig.*, 145 F.R.D. 644 (S.D.N.Y.1993). On June 10, 1993, this Court denied several of the defendants' motions to reconsider the consolidation of these actions, and denied a motion by the Keene Corporation for a stay of this litigation. *See In re New York Asbestos Litig.*, 149 F.R.D. 490 (S.D.N.Y.1993).

The Special Verdicts were rendered seriatim on July 22, 23, and 24, 1993, and on August 19, 1993 certain motions were filed seeking discovery with respect to judgment molding. Post trial motions pursuant to Rule 50(b) of the Federal Rules of Civil Procedure were made September 14. Oral argument concluded on the post-trial motions of all parties on October 14, 1993. On October 15, 1993, the plaintiffs' attorney supplied the Court with copies of his retainer agreements with the plaintiffs. On November 23, 1993, the plaintiffs' attorney sent to the Court by mail a copy of the decision of the New York Court of Appeals in *In re New York County Asbestos*, which is reported at 82 N.Y.2d 342, 604 N.Y.S.2d 884, 624 N.E.2d 979 (1993). These motions were considered fully submitted as of November 23, 1993.

TABOLT

The Flintkote Company ("Flintkote") was the sole defendant, other than settling and non-party defendants, to the claims brought on behalf of Vincent Tabolt ("Tabolt"), who had been employed at the Lowville Builders Cooperative where he worked in the cement room and thereafter as a stock clerk. During the cement room period Tabolt was exposed to asbestos cement, but there was no identification of Flintkote products used during that period. Tabolt's exposure as a stock clerk to Flintkote roofing shingles and Flintkote Orangeburg pipe, a plastic pipe containing asbestos, and the extent of that exposure, was the determinative issue.

The Tabolt Action Was Properly Consolidated

The applicability of *Malcolm v. National Gypsum Co.*, 995 F.2d 346 (2d Cir.1993), to the consolidation issues here was considered in the opinion of the Court dated June 10, 1993. *See* 149 F.R.D. 490 (S.D.N.Y.1993). The factors considered there and in the prior opinion of February 12 included worksite, occupation, time of exposure, disease type, whether the plaintiff was alive or dead, discovery, counsel, and the existence of cancer, all relevant as to the issue of the ability of the jury to differentiate between parties and issues.

Worksite

In the four cases that went to trial there were ultimately two relevant worksites. Luchnick and Pulizzi had their exclusive exposure in the Brooklyn Navy Yard during the same years, 1942-45, and Tabolt's exclusive exposure was in the Lowville Farmers' Cooperative. Because of the nature of the product identification proofs in the Consorti case, which were not site specific, his numerous worksites were irrelevant and not the subject of proof. Because of their limited number, no confusion resulted from the worksites involved.

Occupation

Whatever the impact of dissimilar occupations might have been upon a defendant's "state-of-the-art" defense, none of defendants here made any attempt to distinguish state-of-the-art knowledge by occupation, such as users as opposed to bystanders, shipyard workers or construction workers, or even stock clerks. The distinctions made by the defendants were with respect to disease (asbestosis, lung cancer, and mesothelioma) and factory as opposed to end product exposure. Accordingly, as a practical matter, and for purposes of the instant inquiry, the occupations of the four plaintiffs were functionally equivalent from the point of view of state-of-the-art evidence.

Times of Exposure

Again, the actual offering and presentation of evidence to the jury, along with the limiting instructions given throughout the trial by the Court, clearly distinguished the applicable periods of time. Liability evidence dated after 1945 was carefully excluded in its offer, receipt, and presentation from the Luchnick and Pulizzi cases.

Disease Type

All four of the cases which went to trial dealt with undisputed mesotheliomas.

The Living and the Dead

At the time of trial, John Consorti ("Consorti") was still alive, but the fatality of his disease is certain. Since there was no possibility that the asbestos-related disease of the living plaintiff would not prove fatal, *In re Joint E. & S. Dists. Asbestos Litig.*, 125 F.R.D. 60, 66 (E.D.N.Y.1989), no prejudice could result from trying the claims of a living plaintiff with those who had already died.

Discovery Status

There has been no showing that consolidated discovery practices were in any way prejudicial.

Counsel

The commonality of plaintiffs' counsel favored consolidation and the cooperation and coordination amongst defense counsel also helped to avoid confusion.

Cancer

As mentioned above, all plaintiffs had the same type of cancer, pleural mesothelioma.

Differentiation

Specialized notebooks with photographs of and undisputed biographical information about each plaintiff, along with a list of remaining defendants in each case, were provided to the jury, the members of which took copious notes throughout the trial.

Demonstrative charts distinguishing the separate plaintiffs and the defendants in each case, along with exposure histories for each plaintiff, were used by counsel in their openings.

Cautionary instructions were continuously given to the jury throughout the trial and in the charge concerning the admission of evidence limited to a certain case or a certain issue, and the need to consider each case separately. Moreover, where appropriate, counsel delineated offers of evidence by case and/or defendant.

The summations of counsel addressed each claim separately, utilizing charts which included time lines in order to distinguish between the different relevant periods for liability purposes, as well as citations to the trial record for arguments regarding specific evidence.

Detailed special verdict forms, called for separate determinations of each issue in each case as to each party. There was no conflict between any of the verdicts and no confusion expressed or demonstrated in the rendering of separate verdicts in each of the cases, except as to the Court's charge on the non-economic consortium claim in *Consorti*, Verdict Question 5(h), where the jury awarded damages for the period of Consorti's normal life expectancy (26.2 years) instead of the 9 months it found he would survive with his mesothelioma, and the conflict in the answers on the *Tabolt* special verdict form as discussed below.

As to Consorti, since there was no single site involved, his case was particularly appropriate for consolidation. As has already been discussed, no meaningful distinction could have been made between Consorti's medical condition and those of the other defendants, and no such effort was made by the defendants. Consolidation was therefore appropriate.

A review of the Flintkote defense establishes that its position was unique and easily understood, namely, that Tabolt was not exposed to asbestos through its products. The distinctiveness of its position, in the context of the testimony and the limited number of products involved, precluded any confusion from arising out of the principal Flintkote defense. To consolidate the case, with the concomitant savings with respect to testimony concerning the state of the art and mesothelioma and its relationship to asbestos, was appropriate.

There Was Sufficient Evidence on Exposure To Require Submission Of The Issue To The Jury

The principal contention advanced by Flintkote in its defense to the Tabolt claim is that there was insufficient evidence of exposure to Flintkote products to permit the case to be submitted to the jury. The lynchpin of this defense was the quantum of proof that Tabolt handled the Flintkote product and that the product produced asbestos in an inhalable form.

The Flintkote pipe at issue is black bituminous fiber pipe made from paper products mixed with asbestos into a pulp, cured in rolls, soaked in hot coal tar pitch (the bitumen), and manufactured by a division of the Flintkote Company called Orangeburg. The pipe had orange lettering spelling "Orangeburg" across the length of the pipe. No one at trial ever stated that the pipe at Lowville was seen to have the Orangeburg logo, and Tabolt himself prior to his death did not claim exposure to any black pipe although his duties included handling the pipe.

Bourcy, a salesman for a supplier to the Co-op who sold a rival brand of pipe called Bermico, testified by deposition that he saw "Orangeburg" pipe at the Co-op, since he knew that the pipe sold was not his product and that only Bermico and Flintkote made such pipe at that time, and that therefore he assumed it to be Orangeburg. However, he also testified that, while he had assumed the pipe was Flintkote's, he did not know whether the "Orangeburg"-type pipe was Flintkote's,

Bermico's or some other brand, and that he could have determined what brand of pipe he had seen if he had looked because Flintkote's pipe carried the distinctive imprint of the Orangeburg trademark.

The co-workers at the Co-op testified that it was their practice to refer to all brands of black pipe as "Orangeburg" and that the pipe was a popular item with unique fittings so that competing pipe types are not interchangeable.

Two of Tabolt's co-workers testified that Flintkote's Orangeburg pipe was sold at the Co-op in shipments of at least one hundred lengths of pipe twice a month through the summer months, that Orangeburg pipe was a popular product, and that there were only two types of black drainage pipe sold—Orangeburg and Bermico. They also testified that the Co-op did not stock Bermico, that the fittings were different for Orangeburg and Bermico, that the pipe would break through the unloading process, that the pipe had a "dusty nature," and the dust would be suspended in air. Mrs. Tabolt testified that black and grayish dust was found on her husband's clothing and in his cuffs when she washed them.

Dr. Steven Markowitz, Tabolt's expert, testified that, assuming dust was created in the handling and breakage of black, tar-coated, asbestos-containing fiber pipe, dust would be inhaled into the lungs. Dr. Markowitz was not permitted to testify as to any knowledge of Tabolt's mesothelioma but only generally as to dust containing asbestos fibers.

Dr. Albert Miller, another plaintiffs' expert, testified generally with respect to the properties of asbestos and its ability to cause disease from dust containing asbestos. This general testimony was admitted as to all claims.

A Flintkote employee testified that 200 pounds of asbestos would be mixed with 1100 pounds of newsprint, 50 pounds of celite, and approximately 70 pound of wood pulp in the manufacture of "Orangeburg," yielding an asbestos content of over 14%. These ingredients were covered by a black coating.

While Flintkote attacked the credibility of the co-workers, enough evidence was presented to permit an inference that Tabolt handled the Flintkote pipe and that dust resulted.

The types of proof which were submitted in this case—both circumstantial and otherwise—are sufficient to support a finding of product exposure and causation. *See, e.g., In re New York Asbestos Litig.*, 738 F.Supp. 66, 69 (E.D.N.Y.1990), *aff'd sub nom. Kreppein v. Celotex Corp.*, 969 F.2d 1424 (2d Cir.1992). Plaintiffs in courts in this jurisdiction have demonstrated exposure to dust from asbestos-containing products in order to prove asbestos exposure. *See, e.g., In re Brooklyn Navy Yard Asbestos Litig.*, (Joint E. & S. Dists. Asbestos Litig.), 971 F.2d 831 (2d Cir. 1992); *O'Brien v. National Gypsum Co.*, 944 F.2d 69 (2d Cir.1991); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied*, 498 U.S. 920, 111 S.Ct. 297, 112 L.Ed.2d 250 (1990).

Flintkote has relied upon *Nogan v. GAF Corporation*, 1989 WL 161541 (M.D.Pa. May 24, 1989), where third-party John Crane brought a motion for summary judgment on the grounds that there was no proof that its products were friable, thus contending that there was no evidence that plaintiff was exposed to its products. In support of its motion, Crane submitted reports from experts who performed fiber release tests on its products which concluded that Crane's products did not release asbestos fibers when cut and handled. No proofs were submitted to rebut Crane's expert reports.

Here, from the evidence of asbestos in the pipe and the presence of dust resulting from handling the pipe in Tabolt's presence, the plaintiff sought to have the jury infer that the dust contained asbestos and that Tabolt's inhalation was the cause of his mesothelioma. That proof without contradiction required submission to the jury.

Although there were issues of credibility, there were sufficient facts established—the nature of black pipe, the existence of two competing brands, the exclusivity of the brands resulting from the fittings, the inability to sell the Bermico brand to the Co-op, and the belief of the co-workers that

"Orangeburg" pipe was sold at the Co-op—for the jury to draw the inference that the Flintkote product was sold and produced dust when it was handled, and that Tabolt inhaled that dust which contributed to his mesothelioma.

The State-Of-The Art Evidence Was Properly Admissible Against Flintkote.

George v. Celotex Corp., 914 F.2d 26 (2d Cir.1990), held that a manufacturer of asbestos-containing products is held to the knowledge of an expert in its field. Scientific discoverability, rather than actual knowledge, is the standard by which the relevancy of such evidence is to be judged. Therefore, the knowledge of Eagle Pitcher and Johns Manville establishes not only their own responsibility but the level of knowledge achievable by an expert in the field.

It is Flintkote's position that voluminous "state-of-the art" documents were admitted without an evidentiary showing of the authenticity of those documents. The position is unfounded, for while all objections were preserved, it was established that the state-of-the art documents would be admitted on relevancy grounds unless challenged as to authenticity based on the representation that deposition evidence had been introduced which established the source of the documents and the grounds for admissibility. Some such objections were made and heard. Otherwise the documents were admitted. No error is claimed by Flintkote with respect to any particular document.

Remittitur Is Not Appropriate With Respect to the Damages for Pain and Suffering

The authorities on the subject of excessive verdicts and remittitur are well known, have been cited effectively by both sides, and will not be repeated. They have recently been reviewed by this court in *In re Joint Eastern & Southern Districts Asbestos Litigation*, 827 F.Supp. 1014 (S.D.N.Y.1993) (*Maiorana*), and *Koerner v. Club Mediterranee, S.A.*, 833

F.Supp. 327 (S.D.N.Y.1993). If remittitur is to be contemplated at all, reduction can only be permitted so far as the "maximum amount that would be upheld . . . as not excessive" and not a penny less. *Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1330 (2d Cir.1990); *see also Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 49 (2d Cir.1984). It is further understood that it is appropriate to refer to other determinations in other actions of a similar character, although the Honorable Charles Sifton has noted that asbestos litigation is at an early stage and there are not many years of experience or many verdicts upon which to build the necessary sense of consensus. *In re Joint E. & S. Dists. Asbestos Litig.*, 798 F.Supp. 925, 938 (E.D.N.Y.1992) (*McPadden et al.*), *rev'd on other grounds*, 995 F.2d 343 (2d Cir.), *and rev'd on other grounds*, 995 F.2d 346 (2d Cir.1993).

Undoubtedly, as reflected in the record and as reviewed by his counsel, the pain and suffering experienced by Tabolt over the course of his illness was continual, severe and unrelenting. The jury's award of $7,500,000 for the ordeal of this 46 year old man was certainly not without basis in the record.

The principles relating to remittitur of multi-million dollar awards for pain and suffering in asbestos cases were set forth by Judge Sifton in *In re Eastern & Southern Districts Asbestos Litigation*, 798 F.Supp. 925, 936-38 (E.D.N.Y.1992), *rev'd on other grounds*, 995 F.2d 343 (2d Cir.), *and rev'd on other grounds*, 995 F.2d 346 (2d Cir.1993). After considering the appropriate authorities on the subject, both state and federal, he concluded with respect to the facts then before him that a verdict of $4.5 million was not excessive for a decedent whose pain and suffering had lasted for 11 months.[1] Judge

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[1] The decision in this case, involving the claims of Martin and Anne McPadden, was later reversed and the case was remanded because the Second Circuit found that Judge Sifton had impermissibly admitted evidence of post-injury corrective measures. *See In re Joint E. & S. Dists. Asbestos Litig.*, 995 F.2d 343 (2d Cir. 1993). Reversal on issues relating to liability does not impair the validity of the principles relating to remittitur of judgments discussed by Judge Sifton.

Sifton also noted that the Honorable Helen Freedman, a Justice of the New York Supreme Court who also has had extensive experience in asbestos litigation, has allowed multimillion dollar awards for pain and suffering in the state court's Brooklyn Navy Yard consolidation.[2] It is fair to conclude that Justice Freedman no longer considers the factors which she found applicable to the remittitur of pain and suffering awards in asbestos-related personal injury suits in *Didner v. Keene Corp.*, Index No. 27373/89, N.Y.Sup.Ct. (Dec. 17, 1990), *reported in* N.Y.L.J., January 4, 1991, at 22 col. 2, controlling in view of the subsequent verdicts. While the amounts of the verdicts in this action are undeniably high, the suffering has been acute, particularly in the case of Tabolt who had to endure agonizing trips to New York to obtain treatment which ultimately proved unavailing.

The conscience of courts must not remain fixed in time but must rather retain the capacity for change based on the experience of others and the determinations made in particular cases. At the same time, in asbestos cases in particular, given the scale of the litigation, it is desirable to search for any norms that can be properly established. Using Judge Sifton's determination provides just such a baseline related to time which can appropriately be applied in these cases.

In *McPadden*, Judge Sifton found that no remittitur was required for an award of $4,500,000 for pain and suffering caused by an asbestos-related disease of 11 month's duration. *See In re Joint E. & S. Dists. Asbestos Litig.*, 798 F.Supp. 925, 937–38 (E.D.N.Y.1992), *rev'd on other grounds*, 995 F.2d 343 (2d Cir.), *and rev'd on other grounds*, 995 F.2d 346 (2d Cir.1993). In *Tabolt*, the jury heard testimony that the plaintiff began to experience pain related to his mesothelioma in

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[2] This Court, as has been noted, recently relied upon Justice Freedman's earlier opinion relating to a personal injury suit involving asbestos-related cancer in *Didner v. Keene Corp.*, Index No. 27373/89, N.Y.Sup.Ct. (Dec. 17, 1990), *reported in* N.Y.L.J., January 4, 1991, at 22 col. 2, in reaching our verdict in *Maiorana*. There is, however, a distinction between the cases, since *Maiorana* involved a death resulting from colon cancer, not mesothelioma.

May 1991, (Tabolt Video Tr. at 31-32, 6/3/92), and Tabolt died in November of 1992. The jury's award, therefore, could reasonably have contemplated 18 months of pain and suffering. Duration is a factor that courts may consider in assessing an award for pain and suffering. *Didner v. Keene Corp.*, Index No. 27373/89, N.Y.Sup.Ct. (Dec. 17, 1990), *reported in* N.Y.L.J., January 4, 1991, at 22 col. 2.

McPadden, therefore, was awarded $409,090.91 per month of pain and suffering. If he had suffered for 18 months, as did Tabolt, his award based on this rate would have been $7,363,636.36, which is only $136,363.64 less than the jury's award for pain and suffering to Tabolt. While the verdict in *Tabolt* exceeds the *McPadden* verdict, the judicial conscience is not shocked, given the circumstances of his injury.

While Judge Sifton's discussion of the *McPadden* verdict indicates that Judge Freedman may have reconsidered the conclusions that she reached in *Didner* with regard to awards for pain and suffering, he offered no similar discussion with respect to awards for loss of consortium. Again in an effort to achieve some consistency and to exercise an appropriate judicial conscience, the determinations in *Didner* as to consortium are applicable here as they were deemed to be in *Maiorana*. The application of the *Maiorana* and *Didner* standards to *Tabolt* require the reduction of the consortium award of $1.5 million.

In the absence of any evidence to support a claim of $50,000 for wages lost prior to death and any opposition to Flintkote's motion in that regard, as a matter of law the motion to strike that portion of the verdict must be granted.

The jury's calculation of lost future wages in the amount of $1,700,000 was derived from evidence adduced during the trial, including testimony that Tabolt worked to (and including) age 70. Using a growth rate of 5.5%, his future lost wages would amount to $1,352,584, after reductions for possible unemployment and personal maintenance. The record contains evidence particular to Tabolt that his wage growth

rate between 1984 and 1990 was actually 8.75%, thereby providing a basis in the record for the increased award.

The jury was required to award and properly awarded "the full amount of future damages, as calculated without reduction to present value." N.Y.C.P.L.R. § 4111(f). Thereafter, N.Y.C.P.L.R. § 5041(e) requires the full amount of the future damage award to be reduced to present value by the court and then payments shall be made yearly with four percent to be added to each successive year's payment.

Flintkote's argument that this procedure provides a double recovery for inflation was rejected after thorough attention by the Appellate Division of the New York Supreme Court, Fourth Department, in *Brown v. State*, 184 A.D.2d 126, 128-29, 592 N.Y.S.2d 533 (N.Y.1992), *appeal denied*, 81 N.Y.2d 711, 600 N.Y.S.2d 442, 616 N.E.2d 1104 (1993). There the court "conclude[d] that the statute requires the trier of fact to account for inflation in making its award for future damages and, after the award is made, it requires the court to increase each subsequent annual installment payment by 4% over the previous year's payment." Although the court admitted that it was "unable to ascertain from the legislative history of the statute why the Legislature provided for a 4% increase in the annual payments after the trier of fact applies an inflationary factor in awarding the full amount of future damages," it found that "the statutory language is clear and the court properly complied with it. If there is to be any change in the method of computing the amount of awards for future damages, it must result from an amendment by the Legislature and not by a strained interpretation by the courts." *Id.* at 130, 592 N.Y.S.2d 533.

Flintkote cites two cases, *Alisandrelli v. Kenwood*, 1990 WL 20158 1990 U.S.Dist. LEXIS 2051 (S.D.N.Y. Feb. 27, 1990), and *Peterson v. Zuercher*, 152 Misc.2d 684, 584 N.Y.S.2d 968 (Sup.Ct.1992), which both predate and are of inferior precedential value to *Brown*. Both of these cases state, upon scant consideration, that Article 50-B of the N.Y.C.P.L.R. forbids juries to consider the effects of inflation

in making an award for future damages. The more recent date and superior precedential value of the *Brown* decision, together with the lengthy attention given to this issue in *Brown*, establish it as the correct interpretation of the New York statute.

There Was a Basis For the Jury's Findings With Respect to Apportionment

In connection with apportionment, the jury was instructed to take the following two variables into account in determining the relative share of responsibility of the defendants and the non-party defendants:

(1) the degree of negligence of the conduct, and

(2) the extent of contribution to the causing of that plaintiff's illness.

With respect to the first factor, the degree of negligence, the jury was instructed:

> [I]f all other forces are equal you would apportion a greater share of responsibility to a company that manufactured, distributed, or sold a product containing asbestos, the conduct of which was seriously negligent, reckless and wanton, more than to a company whose conduct narrowly missed compliance with the requirements of reasonable care.

(Tr. at 4503 7/22/93.)

Therefore, the defendant who was more negligent, who acted wantonly or recklessly, should bear a greater share of the liability for a plaintiff's illness.

With respect to the second factor, the jury was instructed:

> [I]f all other factors are reasonably equal you would apportion a greater share of responsibility to a company that manufactured, distributed or sold an asbestos-containing product from which asbestos was inhaled by that

plaintiff in large quantities over a large period of time than to a company whose product was inhaled by a plaintiff in a smaller quantity.

Id.

Some of the evidence presented to the jury upon which it could assess relative responsibility with respect to Tabolt's injuries is as follows:

(a) The Co-op where Tabolt worked sold a variety of asbestos-containing products, including black pipe, various asbestos-containing powdered cements (including A.P. Greene refractory cement, Georgia Pacific joint compound, United States Gypsum Hy-Lite, Structo-Lite, wood fiber plaster cements and joint compound, and W.R. Grace Monokote), and other asbestos-containing products (including GAF cement board and Armstrong vinyl floor tile), (Tr. at 526-27, 530-36, 6/24/93; 1597-1615, 7/6/93; 3881, 7/20/93);

(b) Tabolt's job duties included unloading shipments, handling products in the course of stocking and selling them, and cleaning up any breakage, (Tr. at 532-33, 6/24/93; 1606-13 7/6/93);

(c) Deliveries were made to the Co-op on a weekly basis, (Tr. at 1580, 7/6/93);

(d) When cements were delivered to the Co-op, the bags sometimes broke, creating dust that had to be cleaned up by Tabolt or co-workers, (Tr. at 531, 6/24/93);

(e) The cements to which Tabolt was exposed included A.P. Greene refractory cement, Georgia Pacific compounds, United States Gypsum Hy-Lite, Structo-Lite, wood fiber plaster and joint compounds, and W.R. Grace Monokote, all of which contained asbestos, (Tr. at 3881, 7/20/93), and all of which were delivered to the Co-op in paper bags, (Tr. at 1580-91, 1610-13, 7/6/93);

(f) Black pipe contained asbestos, (Tr. at 1349, 7/1/93);

(g) Handling black pipe generally created about as much dust as handling the cements, (Tr. at 556-57, 6/24/93);

(h) In relative terms, the Co-op sold four times as much cement as black pipe, (Tr. at 2303-04, 7/9/93); and

(i) Tabolt was also exposed to other asbestos-containing products, including Armstrong vinyl tiles and GAF cement board, (Tr. at 3881, 7/20/93).

Flintkote was given an allocation of fault of 21%, which in view of the instructions and the evidence is justifiable.

Allocations of fault were made between those against whom evidence was presented, whether they were present during the trial or not (non-party defendants). There were othes who settled with Tabolt, and Flintkote is entitled to an offset for those settlements in accordance with *Williams v. Niske*, 81 N.Y.2d 437, 599 N.Y.S.2d 519, 615 N.E.2d 1003 (1993). *See* Verdict Molding Section, *infra*.

However, as a prior step in establishing liability, the jury found that asbestos-containing products of Armstrong World Industries were a proximate cause of Tabolt's mesothelioma under an instruction that a product must have been a substantial contributing factor in bringing about injury to establish proximate cause. Thereafter, the jury assigned a 0% of relative responsibility to Armstrong.

"When special interrogatories are submitted to a jury pursuant to Fed.R.Civ.P. 49(a), the jury's answers thereto 'must be consistent with each other,' since they form the basis for resolving the case." *Brooks v. Brattleboro Mem., Hosp.*, 958 F.2d 525, 529 (2d Cir.1992) (quoting *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 890 (2d Cir.1988)). Although a court evaluating a claim of inconsistent answers to special interrogatories must attempt to resolve any apparent inconsistency, "[i]f the jury's answers cannot be harmonized rationally . . . a new trial [must be] ordered." *Id.; see*

also Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884, 891 (2d Cir.1988).

Here, the failure to assign any relative responsibility to Armstrong cannot be rationally harmonized with the finding that Armstrong's products proximately caused Tabolt's mesothelioma. *See Brooks*, 958 F.2d at 529-30 (failure to award damages for pain and suffering); *Finnegan v. Fountain*, 915 F.2d 817, 821 (2d Cir. 1990) (impossible to reconcile special verdict form answer that arresting officer had acted in good faith wiht other answer that officer acted maliciously, wantonly, or oppressively).

The Second Circuit has held that, when a jury's inconsistent answers on a special verdict form can not be harmonized, a court may not simply disregard or eliminate an inconsistent answer. "Such a result does not reconcile the inconsistency, but simply overrules one inconsistent answer." *Auwood*, 850 F.2d at 891-92. To enter a judgment that disregards any material jury finding is an abrogation of the parties' rights under the Seventh Amendment to the United States Constitution. *Id.* at 890-91; *see also Finnegan*, 915 F.2d at 821 ("[W]e cannot give effect to one jury finding directly contradicted by another. . . . To do so would be inconsistent with the parties' right to a trial by jury."); *Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629, 645 (2d Cir.1986) (error for district court not to grant new trial when jury returns inconsistent verdicts); *Bernardini v. Rederi A/B Saturnus*, 512 F.2d 660, 662 (2d Cir.1975) ("[W]hen special verdicts cannot be reconciled . . . the court may not enter a judgment.") A new trial as to the allocation of liability between Flintkote and the non-party defendants must therefore be ordered. *Brooks*, 958 F.2d at 529, 530; *Auwood*, 850 F.2d at 891.

CONSORTI

The jury awarded $20,550,161 to the Consortis, a verdict that each of the defendants attack on a variety of grounds. Except as set forth below, the motions to set aside the verdict are denied.

The Jury Verdict Was Not Tainted

On July 30, over a month after the jury verdicts were returned, the court received a letter from one of the jurors, Carl D'Andrilli. The letter is set forth in full as Appendix E to this opinion. As soon as it was received it was forwarded to counel. In view of the information contained in the letter and the strictures of Fed.R.Evid. 606(b), no further information was considered to be relevant and requests by defense counsel to take the deposition of D'Andrilli were denied.

D'Andrilli's letter reads, in pertinent part:

> [O]n Friday July 23rd and Saturday July 24th, Mrs. Georgia Arnold, another juror, stated that Johns-Manville, a non-party defendant, possesses a one billion dollar fund to pay lawyer's fees to fight asbestos litigation cases. She made these remarks to the jury while we were deliberating monetary awards in the Consorti and Pulizzi cases. She also mentioned this "fund" one other time, a few days before deliberations began.
>
> I didn't know if this was general knowledge that a well-informed person could possess while serving as a juror dealing wth well-publicized matters, or if it was improper.
>
> * * *
>
> After the completion of the case on Saturday, jurors and lawyers were engaged in conversation outside the courtroom and later in front of the building. A lawyer commented to me that Mrs. Arnold had remarked that she was disappointed that the award wasn't larger. He asked me how much higher she desired to go. I answered probably much higher since she believed Johns-Manville was spending one billion to fight cases.

The information conveyed by Mrs. Arnold was, of course, extra-judicial. Johns Manville, its products, and the state of its knowledge had been the subject of testimony during the

trial. Defense counsel had stated that Johns Manville was in bankruptcy, and, of course, Johns Manville was a non-party defendant which had not appeared in the action. The statement by Mrs. Arnold during the course of the trial troubled Mr. D'Andrilli according to his letter, but he did not raise the issue then or during the Consorti, Pulizzi, and Luchnick deliberations at a time when an appropriate instruction could have been given. The statement came to light only as a consequence of post trial discussions with defense counsel whose reactions caused Mr. D'Andrilli to be concerned enough first to call chambers and then ultimately to write. The issue thus surfaced as a result of the questioning and statements of defense counsel.

The jurors were instructed, more than once, that their verdict had to be based on the evidence adduced in the courtroom and that they must disregard any information which reached them from any source other than the witnesses and the exhibits. It must therefore be presumed that whatever her beliefs were, Mrs. Arnold's information was not evidence upon which any juror relied in reaching their verdict, particularly since Mrs. Arnold had mentioned her belief as an explanation of her disappointment that the verdicts rendered were not larger. *See Herring v. Meachum,* 11 F.3d 374, 378 (2d Cir.1993) (must presume jury follows instructions unless overwhelming probability they were unable to); *United States v. Castano, 999* F.2d 615, 618 (2d Cir.1993) (same).

Given the notoriety of the Manville Fund litigation—the class settlement, *see In re Joint Eastern & Southern Districts Asbestos Litigation,* 129 B.R. 710 (E.D.N.Y.1991), its reversal by the Second Circuit, at 982 F.2d 721 (2d Cir.1992), and the publication of numerous stories in the New York Times and Wall Street Journal—any well-informed citizen could possess general knowledge about Johns Manville, *c.f., Government of Virgin Islands v. Dowling,* 814 F.2d 134, 138 (3d Cir.1987) (likelihood of prejudice from extra-record information depends on nature of information and manner in which it was conveyed). An expression of such "general knowledge"

does not qualify as "extraneous prejudicial information" within the exception of Rule 606(b). *See Government of Virgin Islands v. Gereau,* 523 F.2d 140, 151 (3d Cir.1975), *cert. denied,* 424 U.S. 917, 96 S.Ct. 1119, 47 L.Ed.2d 323 (1976); *Pacific Employers Ins. C. v. Orren,* 160 F.2d 1011 (5th Cir.1947).

In any case, the statement concerning Johns Manville was not prejudicial to these defendants. Certain jurisdictions have seemingly adopted a rebuttable presumption of prejudice standard, *see United States v. Howard,* 506 F.2d 865, 869 (5th Cir.1975), in the circumstance of "outside influence" improperly brought to bear upon a juror, *see Haley v. Blue Ridge Transfer Co.,* 802 F.2d 1532 (4th Cir.1986), when there is an improper communication from outside the jury room, from whatever source.

However, our Court of Appeals has not adopted such a rigid standard for the "extraneous information" circumstance but has left it to the district court to determine "the nature of what has been infiltrated and the probability of prejudice." *United States ex rel. Owen v. McMann,* 435 F.2d 813, 818 (2d Cir.1970), *cert. denied,* 402 U.S. 906, 91 S.Ct. 1373, 28 L.Ed.2d 646 (1971). Indeed, it has stated "that the trial court's post-verdict determination of extra-record prejudice must be an objective one, measured by reference to its probable effect on 'a hypothetical average juror.' " *United States v. Calbas,* 821 F.2d 887, 896 n. 9 (2d Cir.1987), *cert denied,* 485 U.S. 937, 108 S.Ct. 1114, 99 L.Ed.2d 275 (1988). By that objective standard and based upon the factors already set forth, it is concluded that the extraneous information did not prejudice the jurors in such a fashion as to require a new trial.

A second basis of jury taint or improper prejudice has been raised. After the jury's verdict for plaintiff in excess of $13,000,000 in the *Tabolt* case, the first special verdict submitted to the jury, and just prior to their discharge for the evening, the Court praised the jury for completing their deliberations in the first case and on the manner in which they had conducted themselves during both the trial and the delibera-

tions, concluding, in an exercise of effusion, that it was "probably the best jury that has ever been put together in the United States of America." (Tr. at 4568, 7/22/93.) After the jury departed, and in response to objections promptly and properly raised by the defense, the Court stated that it would give a curative instruction the next morning and invited suggestions.

The next morning, just before the jury resumed deliberations on the remaining three cases, including *Consorti*, defendants made a motion for a mistrial based on the comment made by the judge to the jury the night before. The Court denied the motion for a mistrial and clarified the comment to the jury:

> Last night just before we broke I told you that you were the best jury in the United States. Everybody agrees with that proposition.
>
> However, I wanted to be clear that since you have entered a verdict in one case that I was referring, of course, not to the verdict in any way, about which I have no control, that is entirely in your hands, but, rather, in the way in which you conducted yourselves, the attention that you have spent, your diligence in being here on time and all of those matters. It's the way in which you have conducted yourself, not the verdict itself.
>
> As far as I am concerned, I have nothing to do at this time with the verdict at all, and you are completely the masters and mistresses of the facts and it is entirely up to you.
>
> I am not going to repeat all of that portion of the charge in which I told you that it is your responsibility and my only responsibility is simply to advise you on the law. But I'm sure you recall that portion of the charge.
>
> I couldn't put it more strongly to you that I have no interest at this moment in how you decide the case, I was

simply complementing [sic] you on the way in which you went about deciding the case.

It's appropriate, also, I think at this point to remind you once again that you decided one case and you have decided it in a fashion that you feel is appropriate. That decision should not control as to any plaintiff or any defendant in any of the other cases.

We recognize, of course, all of us, you, the lawyers, myself, that there are certain common aspects about the case and you may consider some of those common aspects in each one of the cases, but you mustn't, I would remind you, also, you mustn't consider anything in one case that I told you should be limited to another case.

But I would just stress again, you have to decide the remaining cases with respect to each plaintiff with respect to each defendant with respect to each cause of action.

I have stressed that in the past and I simply repeat that any decision which you made yesterday has no bearing on the decision which you make today.

(Tr. at 4574-75, 7/23/93.)

No additional or specific requests for further instructions were made. While the comments on the evening of July 22 were undoubtedly overly zealous positive reinforcement, the jury's obligations and the court's were placed in the proper perspective the next morning before deliberations were resumed. Given the overall instructions as to the jury's function and the curative instruction, no basis for requiring a new trial for Consorti, Luchnick and Pulizzi has been established.

Consolidation of the Consorti Case Was Appropriate

The opinions of February 12, 1993 and June 10, 1993 set forth the applicable criteria for consolidation, as recently

repeated by the Second Circuit in *Malcolm v. National Gypsum Co.*, 995 F.2d 346 (2d Cir.1993), although those Opinions dealt with more cases than eventually went to trial. The applicability of the *Malcolm* factors has been discussed above.

The Evidence Was Sufficient to Base a Verdict Against All the Defendants

Both Consorti and his brother testified to the identification of the asbestos products to which Consorti was exposed, and there is sufficient evidence to support the jury's verdict as to liability which is only seriously challenged by Porter Hayden and Atlas Turner.

Porter Hayden, a Maryland corporation, was principally an insulation contractor, and on occasion sold Johns Manville products, both asbestos-containing and non asbestos-containing. Typically, sales of products by Porter Hayden would be to customers as part of furnishing contracting services to industrial sites and facilities, and not to its competitors.

Porter Hayden sold products to one of Consorti's employers, State, for which he last worked in 1970. (Tr. at 1960-61, 7/7/93.) Porter Hayden and State had no further business dealings after 1970 or 1971 when there was a dispute over an outstanding account owed to Porter Hayden by State.

Although Consorti was on the State payroll from 1963 until 1970, he testified that he started working for State in 1968 and that he worked for both State and Veteran during this period. He also testified that during his employment with State he picked up materials at Porter Hayden's Newark facility.

There was no testimony by Consorti as to the asbestos content of the products that he obtained from Porter Hayden.

Peter Consorti, the brother of the plaintiff, testified that Consorti was exposed to asbestos-containing products supplied by Porter Hayden based in part upon Consorti's signature on some of the Porter Hayden invoices However, these invoices did not refer to asbestos-containing products. Although Peter Consorti testified that he was "not too famil-

iar with what went on with State Pipe Covering," he testified that Consorti was exposed to asbestos-containing products supplied by Porter Hayden while he was employed by State.

Although an effort was made to place Porter Hayden materials containing asbestos at a job site where Consorti worked (the Vulcan Materials site), the documents failed to support the contention. Consorti was left with Peter Consorti's testimony which cannot be said as a matter of law to have been insufficient to prove the presence of Porter Hayden products at State at a time when Consorti was employed there.

There was sufficient evidence to establish that Porter Hayden had, or should have had, knowledge of the dangerous characteristics of asbestos-containing products arising out of its treatment of the workers' compensation claims of its own employees. *See* Pl.'s Ex. PH 13.

Similarly, Peter Consorti is the source for the identification of asbestos products sold by Atlas Turner to State during the period that Consorti was working at State. While the 1978 break-in testimony which resulted in photographs of Atlas Turner products was unavailing to establish the use of such products by Consorti, particularly given the unchallenged testimony that Atlas Turner ceased using asbestos in its products after 1972, there is in the record the statement by Peter Consorti that State purchased Atlas Turner products containing asbestos during the relevant period. The statement is sufficient to support the jury verdict.

The Record Supports the Jury Finding that Veteran Was Not Liable

Consorti was employed by the third-party defendant, Veteran Pipecovering, Inc. ("Veteran") from 1960 to 1963, and from 1970 to 1978, and the jury concluded that the evidence at trial demonstrated that no liability should be imposed on Veteran because it was not liable for failure to provide a safe work place as required by New York labor law, or as a supplier of asbestos-containing products.

New York Labor Law § 200 is the codification of the duty of owners and contractors to provide a safe workplace, *Monroe v. City of New York*, 67 A.D.2d 89, 414 N.Y.S.2d 718, 722 (1979), and Labor Law § 241(6) further imposes a non-delegable duty upon owners and contractors to provide "reasonable and adequate" protection to those lawfully at construction sites. To that end, worksites are required to be "constructed, shored, equipped, guarded, arranged, operated and conducted" so as to provide workers with proper protection. *Id.*

The New York Industrial Code, specifically 12 N.Y.C.R.R. §§ 12 & 23, implements and further defines New York labor law, and provides a further statutory basis for imposing liability upon Consorti's employers. *See DaBolt v. Bethlehem Steel Corp.*, 92 AD.2d 70, 459 N.Y.S.2d 503, 506 (1983). A violation of these rules by an owner or contractor is evidence of negligence. *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 298, 405 N.Y.S.2d 630, 376 N.E.2d 1276 (1978).

Industrial Code Rule 12, 12 N.Y.C.R.R. 12 (Control of Air Contaminants) provided, as early as 1956, that five million particles of asbestos dust per cubic foot of air constitutes "prima facie evidence" of dangerous air contaminants on construction sites. *In re Joint E. & S. Dists. Asbestos Litig. (Phase I, Powerhouse Cases)*, Memorandum and Order, Sept. 10, 1991, at n. 3; *see* 12 N.Y.C.R.R. § 12-3.1, tbl. II. This is New York's codification of the Threshold Limit Value ("TLV") first recommended by an organization of scientists in 1946. In 1959, Rule 23 was extended to impose a duty to provide a safe work place to employers, owners, contractors, and subcontractors in the construction industry. *In re Joint E. & S. Dists. Asbestos Litig. (Phase I, Powerhouse Cases)*, Memorandum and Order, Sept. 10, 1991, at n. 3; *see* 12 N.Y.C.R.R. § 23-1.5(a).

The duty to provide a safe work place at common law and under N.Y. Labor Law §§ 200 and 241(6) also encompasses the obligation to provide workers with safe tools and appliances. *See Pieczonka v. Pullman Co.*, 89 F.2d 353, 357 (2d

Cir.1937) (adequacy of a sponge mask to protect sandblaster from silica decided upon common law principles). The duty to provide a safe worksite includes the duty to make reasonable inspections to detect dangerous conditions and hidden defects. *Monroe v. City of New York*, 67 A.D.2d 89, 414 N.Y.S.2d 718, 722-23 (1979).

Additionally, an owner has an obligation under N.Y.Labor Law § 200 to warn those lawfully on the premises of hidden dangers of which it knew or should have known. *Gasperino v. Larsen Ford, Inc.*, 300 F.Supp. 1182 (S.D.N.Y.1969), *aff'd*, 426 F.2d 1151 (2d Cir.), *cert. denied*, 400 U.S. 941, 91 S.Ct. 238, 27 L.Ed.2d 245 (1970) (defendant as dealer knew or should have known from its experience of dangerous levels of carbon monoxide created by moving cars in its basement). The purpose of the common law, the Labor Law, and the Industrial Code was, and is, to protect workers from injuries and to eliminate dangerous conditions at worksites.

No testimony established that Veteran was aware of threshold limit values for the work place or measured dust levels or was aware of New York labor laws regarding the responsibility of an employer to comply with rules preventing air contamination or to provide, install, and maintain protective equipment for their employees.

There was no evidence presented with respect to the level of dust at any worksite for which Veteran had responsibility. Further, Veteran was not a supplier of asbestos products with knowledge of the dangerous propensities of the products being supplied or responsibility to learn their characteristics. Its situation in that regard differed markedly from Porter Hayden. The proof with respect to Veteran's knowledge did not equate its responsibility to that of a manufacturer.

Mrs. Consorti Had An Appropriate Loss Of Consortium Claim

The New York State Court of Appeals decision in *Anderson v. Eli Lilly & Co.*, 79 N.Y.2d 797, 580 N.Y.S.2d 168, 588 N.E.2d 66 (1991), and the decision of this court in *Walsh v.*

Armstrong World Industries, Inc., 700 F.Supp. 783 (S.D.N.Y. 1988), are controlling with respect to the validity of Mrs. Consorti's consortium claim since the tortious conduct alone, and not the resultant injuries, preceded the Consorti's marriage.

In *Anderson* the Court of Appeals held that since the wife's exposure to DES and her resultant injuries both occurred before the marriage, the husband's consortium claim had to be dismissed. Unlike the plaintiff in *Anderson*, Consorti was not injured (*i.e.*, he did not have mesothelioma) prior to his marriage. Indeed, at the time of their marriage, Consorti had no viable cause of action against these defendants.

In *Walsh*, the Honorable Raymond J. Dearie dismissed the consortium claim of the surviving spouse of an asbestos-related disease victim who was injured, and whose injury was manifest, at the time of the marriage.

In the case of William Croon, *In re Joint E. & S. Dists. Asbestos Litig.*, 1991 WL 85942, 1991 U.S. Dist. Lexis 6422 (S.D.N.Y. May 9, 1991), the Honorable Charles P. Sifton dismissed the consortium claim of a widow whose decedent developed mesothelioma while they were divorced, and prior to their subsequent remarriage. Indeed, the resultant injuries from which Mrs. Croon's loss arose—the mesothelioma—occurred between the Croon's marriages (yet decades after Mr. Croon's exposure to asbestos). Accordingly, Judge Sifton dismissed the consortium claim.

The time of injury, not the conduct, determines whether or not the consortium claim is barred.

Inconsistency of Answers on the Consorti Special Verdict Form

In the charge delivered to the jury in this matter, the jurors were instructed that Mrs. Consorti, if she prevailed, would be entitled to recover for her non-economic damages for loss of consortium, and that these damages, if any, were to be awarded for Mr. Consorti's life expectancy with mesothelioma. (Tr. at 4496, 7/22/93.) In addition, the jurors were

instructed that Consorti, if he prevailed, was entitled to recover sums of money which would justly and fairly compensate him for any pain and suffering which they found he would experience in the future. The jury was directed to indicate how long into the future his suffering will continue. *Id.* The jury also heard evidence to the effect that a man of Consorti's age had a life expectancy of 26.2 years. *Id.* at 4497.

In Question 5(b) of the special verdict form in the *Consorti* case, the jurors found that Consorti's pain and suffering would continue for nine months into the future. This response must be interpreted as indicating that the jury had found that Consorti's life expectancy with mesothelioma was nine months. In question 5(h) of the special verdict form in the *Consorti* case, the jury initially awarded Frances Consorti future non-economic damages for loss of consortium for a period of 27.6 years. Since the jury was instructed to award future non-economic damages for loss of consortium for Consorti's life expectancy with mesothelioma, their response to question 5(h) indicated that Consorti had a life expectancy with the disease of 27.6 years.

After the verdict was rendered in this case, but before the jury was discharged, plaintiffs' counsel advised the Court of the internal inconsistencies in the jury's determinations of Consorti's life expectancy with the disease. (Tr. at 4606-32, 7/24/93.) Over the defendants' objection, the Court recalled the jury, re-read the part of the jury charge concerning loss of consortium, and asked the jury to decide if they wanted to modify their original award. *Id.* This was done to provide the jury with the opportunity to correct these internal inconsistencies. After deliberation, the jury lowered the number of years for non-economic loss of consortium from 27.6 years to 26.2 years, which did not eliminate the internal inconsistencies in the answers on the special verdict form. The Court did not seek further clarification from the jury.

In *Auwood* and *Brooks, supra,* the Second Circuit held that, when faced with inconsistent answers on a special verdict form, the court must attempt to harmonize the answers, if this

is possible under a fair reading of them. However, if there is no way to harmonize the jury's answers, the court must order a new trial.

In *Auwood,* the jury in an antitrust action found that the defendants had violated the plaintiffs' rights, but did not find that the plaintiffs had proven damages under the proffered theories. In response to a question asking what amount the plaintiffs had proven would fairly compensate them for actual losses sustained, however, the jury awarded a total of $75,000.00, labelling these damages as "nominal."

The trial court concluded that the jury could not have intended its award to constitute compensatory damages but only nominal damages, consistent with the label attached to them. The court then ruled that, as a matter of law, $75,000.00 was not nominal, and reduced the judgement to $3.00.

The Second Circuit held that, if there had been an interrogatory asking whether plaintiffs had proven any damages and the jury had answered "no," that answer would have been inconsistent with the answers specifying the dollar amounts of damage:

> With no apparent way to harmonize those answers, the court would not be entitled to enter a judgement favorable to the defendants simply because the "no" answer was consistent with another answer. Such a result does not reconcile the inconsistency, but simply overrules one inconsistent answer. Had such an irreconcilable inconsistency existed, the court should have granted a new trial as to damages.

Auwood, 850 F.2d at 891-92.

To enter a judgment that disregards any material jury finding abrogates the parties' rights under the Seventh Amendment to the United States Constitution. *Id.* at 890-91.

Similarly, in *Bernardini v. Rederi A/B Saturnus,* 512 F.2d 660 (2d Cir.1975), the Second Circuit found irreconcilable responses to a special verdict form that declined to find a ves-

sel unseaworthy and yet found the shipowner guilty of negligence. The court stated that "when special verdicts cannot be reconciled . . . the court may not enter a judgement." *Id.* at 662; *see also Brooks v. Brattleboro Mem. Hosp.*, 958 F.2d 525, 529 (2d Cir.1992); *Finnegan v. Fountain*, 915 F.2d 817, 821 (2d Cir.1990); *Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629, 645 (2d Cir. 1986).

It is impossible to reconcile the jury's answers to Questions 5(b) and 5(h) of the special verdict form in the Consorti case. In an attempt to correct this inconsistency, defendants Owens Corning Fiberglas ("OCF") and Porter Hayden suggest that the jury's findings with regard to Mrs. Consorti's future non-economic damages be converted into a ratio. Rather than awarding Mrs. Consorti $4,000,000.00 for 26.2 years, in other words, these defendants would interpret the jury's findings as awarding Mrs. Consorti $4,000,000.00 *per* 26.2 years, a calculation which reduces these damages to either $114,286.00, (Porter Hayden's Mem. on Verdict Molding at 22), or $114,504.00, (OCF Mem. on Verdict Molding at 22). Under the precedents of this Circuit discussed above, however, this Court is not to so modify the jury's responses.

Ordinarily, this might require a new trial both on the issue of Mrs. Consorti's future non-economic loss of consortium and of Consorti's future pain and suffering, since the jury's answers on these issues are in conflict. However, the jury's findings with regard to Mrs. Consorti's future non-economic damages for loss of consortium shall be set aside as against the weight of the evidence. There is no reason, therefore, to disturb the jury's findings with regard to Mr. Consorti's future pain and suffering.

Under Fed.R.Civ.P. 59, a new trial may be granted if the verdict of the jury is so strongly against the weight of the evidence that it may be characterized as a "seriously erroneous result." *High v. Jacobs*, 961 F.2d 359, 365 (2d Cir.1992); *Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d 363, 370 (2d Cir.1988); *Flynn v. Goldman, Sachs & Co.*, 836 F.Supp. 152 (S.D.N.Y.1993).

At trial, the jury in the Consorti case heard testimony that Consorti's normal life expectancy, without mesothelioma, was 26.2 years. This information was reiterated in the jury charge. (Tr. at 4497, 7/22/93.) There was no evidence upon which the jury could have found that Consorti's life expectancy was unchanged with mesothelioma. More likely, the jury misunderstood their responsibilities and awarded Mrs. Consorti damages for the period of Consorti's life expectancy without mesothelioma. Since the jury's finding that Consorti's life expectancy with mesothelioma was 26.2 years for purposes of determining Mrs. Consorti's damages for future non-economic loss of consortium is strongly against the weight of the evidence, it is a "seriously erroneous result." A new trial must be held on the issue of Mrs. Consorti's future non-economic damages for loss of consortium. This result has the additional effect of eliminating the inconsistency in the jury's findings.

Remittitur Is Required With Respect To The Award Of Economic Damages For Future Consortium

The standards discussed above, when applied to the awards made by the jury for pain and suffering, indicate the jury's finding was consistent with those considered by Judge Sifton and the conclusions here previously reached, as is the award for the loss of past consortium. However, the award for economic damages for loss of future consortium must be reduced to $750,000, applying the *Maiorana* and *Didner* standards.

The Evidence Failed To Establish Consorti As A "Sophisticated User" And Thereby Comparatively Negligent

The defendants claim that Consorti, as a pipecoverer, should have been charged with the knowledge of similarly trained and skilled pipecoverers, thereby allowing them to argue the applicability of New York's "sophisticated user" defense. The "sophisticated user" or "knowledgeable user" defense focuses on proximate cause, which is a necessary predicate to finding liability. Proximate cause can not be

found when the plaintiff is a knowledgeable user who is actually aware of the dangerous nature of the product supplied. *See Andrulonis v. United States*, 924 F.2d 1210, 1222 (2d Cir.), *vacated*, ___ U.S. ___, 112 S.Ct. 39, 116 L.Ed.2d 18, *and reinstated*, 952 F.2d 652 (2d Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2992, 120 L.Ed.2d 869 (1992); *Belling v. Haugh's Pools Ltd.*, 126 AD.2d 958, 511 N.Y.S.2d 732, 733 (App.Div.), *app. denied*, 70 N.Y.2d 602, 518 N.Y.S.2d 1024, 512 N.E.2d 550 (1987).

As pointed out in *Andrulonis*, however, the "knowledgeable user exception" involves a subjective test: whether the particular user was aware of the danger. *Andrulonis*, 924 F.2d at 1222; *see also Kerr v. Koemm*, 557 F.Supp. 283, 287 (S.D.N.Y. 1983). This is in contrast to a supplier's duty to warn, which arises if he or she knows or should have known of a potential danger. *See Andrulonis*, 924 F.2d at 1223.

In the present case, there was no showing that Consorti in fact had knowledge of the dangerous properties of asbestos-containing materials. Refusal to charge him with the knowledge of similarly trained and skilled pipecoverers was proper.

The Summary Evidence Proffered By OCF Was Properly Excluded

OCF proffered a summary of invoices of asbestos-containing products contained in boxes held by third-party defendant Veteran, Consorti's employer between the years 1965 and 1978. The proffer included the summary testimony and exhibits of Christopher Barry ("Barry"), a certified public accountant. The invoices were obtained from Veteran in the ordinary course of discovery, and comprised the existing available documentation of purchasing by Veteran and State. Twenty-six thousand items, including invoices, checks, and daily work logs, were admitted into evidence *en masse*.

In order to determine which products were asbestos-containing, Barry relied upon descriptions in the invoices themselves and information provided by a paralegal at Tucker,

Biegel & Goldstein, counsel for OCF. A computerized list of products containing asbestos, which was the source of the information provided by the paralegal, had been generated from interrogatories, admissions of defendants in asbestos litigation, and product guides produced by defendants. Based upon this information, Barry created the summary evidence in the form of charts and graphs which were marked for identification by OCF but were not admitted into evidence. The Court, over objection by OCF, excluded the summary charts and graphs and severely limited Barry's testimony. The summary evidence was excluded on two grounds: 1) the records may not have comprised the universe of Veteran documents, and 2) the basis of the exclusion of certain invoices from the summaries was unclear.

The proffered summary did not deal with all 26,000 documents; nor with all of the 2000-3000 invoices that were said to have been contained therein. The subject summary was predicated on 1105 invoices that the witness concluded related to asbestos-containing products. Since this conclusion, and hence the summary itself, was based in part upon the "data base," it contained information not present in and not taken solely from the underlying proof, *see United States v. Scales*, 594 F.2d 558, 561-63 (6th Cir.), *cert. denied*, 441 U.S. 946, 99 S.Ct. 2168, 60 L.Ed.2d 1049 (1979), and was thus inadmissible, *see, e.g., Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 301 (3d Cir.1961). In short, it did not "fairly represent" the underlying documents, but summarized only those documents that, according to the witness, dealt with asbestos. *See Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1516 (9th Cir.1985). The computerized list was not introduced nor was it made available in court or for review and inspection by counsel for Consorti. In the absence of the list and any testimony concerning its preparation, the summary based upon it became inadmissible. *See United States v. King*, 616 F.2d 1034, 1041 (8th Cir.), *cert. denied*, 446 U.S. 969, 100 S.Ct. 2950, 64 L.Ed.2d 829 (1980); *Gordon v.*

United States, 438 F.2d 858, 876-77 (5th Cir.), *cert. denied*, 404 U.S. 828, 92 S.Ct. 139, 30 L.Ed.2d 56 (1971).

The Finding Of Concerted And Reckless Action By The Defendants Was Supported By The Evidence

The defendants do not challenge the instructions to the jury with respect to concerted and reckless action on the part of the defendants but rather claim that the evidence was insufficient to support the finding.

Atlas Turner, Fibreboard, Flintkote, Keene, and OCF were affiliated with industry trade associations that shared knowledge concerning the hazards of asbestos, and acted collectively to promote their common interest. These proofs alone were sufficient to support the jury's findings.

Concerted action is well illustrated by the New York Court of Appeals in *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 450 N.Y.S.2d 776, 436 N.E.2d 182 (1982), where—in considering a concert of action liability problem in the context of DES cases—the Court said:

> The clearest example of concerted action liability is the drag race. Where two drivers agree to race and one collides with and injures a third party, the other driver is fully responsible for the third party's injuries even though there was no contact between that driver's car and the injured person.

Id. at 581, 450 N.Y.S.2d 776, 436 N.E.2d 182.

In this example there was no shared intent or agreement to strike the pedestrian, just the concerted improper conduct, sufficient in fact to impose liability even on a vehicle which normally would have a valid proximate causation defense. *See also De Carvalho v. Brunner*, 223 N.Y. 284, 119 N.E. 563 (1918).

In the instant cases the supply of raw asbestos, the manufacture of asbestos products, and the promotion, sale and distribution of those products, all jointly undertaken without adequate warnings, was the knowing action taken in concert

participated in by the defendants that formed a sufficient basis for the jury's findings.

The record contains evidence that both OCF and Porter Hayden were aware of the dangers of asbestos inhalation prior to the time that Consorti began working with their products and that neither company provided warnings or took any action with respect to these perceived dangers until 1973. On this evidence and the state-of-the art evidence the jury was entitled to conclude that the defendants were reckless.

LUCHNICK

There Is Sufficient Evidence To Support The Verdict

Neither Fibreboard nor Keene have seriously challenged the evidence that established that their products were being used during the period that Luchnick was working at the Brooklyn Navy Yard. Fibreboard has questioned the sufficiency of the evidence with respect to one of the elements of the design defect cause of action, namely, the feasibility of designing the product in a safe manner. However, the evidence is undisputed that after 1972 just such design changes were accomplished by all the manufacturers. In addition, the record does contain evidence of consideration of materials to substitute for asbestos prior to that period. From this evidence and the lack of any evidence to the contrary it was appropriate for the jury to infer that a feasible substitute was available. No challenge has been made to the instructions to the jury, but only to the evidence which for the reasons indicated was sufficient.

Fibreboard contends in addition that, even if the plaintiffs presented sufficient evidence of an alternative feasible design, the military contractor defense precludes a finding of liability against them under a design defect theory. Under the military contractor defense, a supplier cannot be liable for design defects in goods supplied to the military if the United States approved reasonably precise specifications for the products, the material conformed to those specifications, and the supplier warned the United States about the dangers in the use of

the materials that were known to the supplier but not to the United States. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 512, 108 S.Ct. 2510, 2518, 101 L.Ed.2d 442 (1988); *In re Brooklyn Navy Yard Asbestos Litig. (Joint E. & S. Dists. Asbestos Litig.)*, 971 F.2d 831, 839 (2d Cir.1992); *In re Joint E. & S. Dists. New York Asbestos Litig.*, 897 F.2d 626, 629 (2d Cir.1990). The Court instructed the jury on the military contractor defense. (Tr. at 4475, 7/22/93.) Once established, the military contractor defense is a complete defense to a design defect claim. *Boyle*, 487 U.S. at 512, 108 S.Ct. at 2518.

The defendant bears the burden of proof with respect to each element of the defense. *Beaver Valley Power Co. v. National Eng'g & Contracting Co.*, 883 F.2d 1210, 1217 n. 7 (3d Cir.1989); *Deniston v. Boeing Co.*, 1990 WL 37621 at *3, 1990 U.S.Dist. LEXIS 3509, at *9 (N.D.N.Y. March 28, 1990); *Zinck v. ITT Corp.*, 690 F.Supp. 1331, 1338 (S.D.N.Y.1988). The jury was instructed that the defendants had this burden. (Tr. at 4475, 7/22/93.)

In the present case, the jury determined that Fibreboard did not meet its burden of proof regarding the military contractor defense. Fibreboard presented no evidence that it attempted in any way to find out what the United States Government knew about the dangers in the use of asbestos, or that it attempted in any way to warn the Government about these dangers. The jury's rejection of this defense, therefore, is not without support in the record.

The record contained testimony from those who had worked on the ships on which Luchnick had worked that Fibreboard products had been used on those ships. That evidence was sufficient to base an inference that Luchnick had inhaled dust from Fibreboard products.

Fibreboard also defended against Luchnick's claims by asserting that his mesothelioma resulted from his use of Kent Micronite cigarettes, manufactured by Lorillard, which used filters that contained asbestos. The jury failed to find that the cigarettes were a proximate cause of Luchnick's contraction

of the disease that was responsible for his death. In view of the absence of any evidence as to the period when the cigarettes containing asbestos were on the market, it was well within the purview of the jury to conclude that the defense was not established that the asbestos to which Luchnick was exposed came from the cigarettes.

Remittitur Is Required With Respect To The Award Of Damages For Loss Of Consortium

For the reasons previously set forth, the jury award for damages with respect to pain and suffering is within the parameters which have been determined to be applicable. The award for loss of consortium for the reasons already set forth should be reduced to $500,000.

PULIZZI

The determinations set forth above dispose of the issues raised with respect to Pulizzi, whose case was comparable to Luchnick's except for the cigarette defense and an excessive loss of consortium award.

JUDGMENT MOLDING

Article 16 of the N.Y.C.P.L.R.

N.Y.C.P.L.R. § 1601(1) provides that when a plaintiff wins a suit for personal injuries against multiple tortfeasors, each tortfeasor who is 50% or less responsible for the plaintiff's injuries is not liable for more than its assessed share of noneconomic damages. This limitation does not apply, however, if the defendant was found to have acted either recklessly, N.Y.C.P.L.R. § 1602(7), or knowingly or intentionally and in concert with others to cause the acts or failures upon which the liability is predicated, N.Y.C.P.L.R. § 1602(11). In light of the above treatment of the jury's findings with regard to recklessness and action in concert, Article 16 is inapplicable to the present cases.

N.Y.G.O.L. § 15-108

As an initial matter, the jury was correctly instructed that the defendants had the burden of proof on the issue of allocation of responsibility. *See In re Joint E. & S. Dists. Asbestos Litig.*, 741 F.Supp. 50, 51 n. 2 (E.D.N.Y.1990). Flintkote's assertion to the contrary, relying on *Hill v. St. Clare's Hospital*, 67 N.Y.2d 72, 499 N.Y.S.2d 904, 490 N.E.2d 823 (1986), is unavailing.

Hill involved successive, rather than joint tortfeasors.[3] The Court of Appeals therein held that, when a plaintiff releases an original tortfeasor from all claims including claims related to the aggravation of the injury due to the actions of successive tortfeasors, the successive tortfeasors have a right to a set off under N.Y.G.O.L. § 15-108 for the portion of the amount paid by the original tortfeasor for release from the claims relating to the aggravation of the injuries.

In *Hill*, the successive tortfeasor was liable for the aggravation, but not for the original injury. Because the injured party and the original tortfeasor, by stipulating to the allocation of the settlement monies between the original injury and the aggravation, were permitted to stipulate to the amount by which the liability of the successive tortfeasor was to be reduced by the original tortfeasor's payment, the court held that it was the plaintiff's burden to prove what portion of the settlement payment was for the aggravation injuries. This rule is inapplicable to the present case, involving joint, rather than successive tortfeasors.

The defendants contend that, if the plaintiff has received any money from any entities who were not on the verdict sheet, they are entitled to a separate credit for such payments under N.Y.G.O.L. § 15-108. In *Williams v. Niske*, 81 N.Y.2d 437, 599 N.Y.S.2d 519, 615 N.E2d 1003 (1993), the New York Court of Appeals considered this precise issue in an action for personal injuries brought against multiple defen-

[3] The court held that G.O.L. 15-108 applies to successive, as well as joint tortfeasors. *See Hill*, 67 N.Y.2d at 83, 499 N.Y.S.2d 904, 490 N.E.2d 823.

dants. One year prior to the trial, the plaintiffs settled with four of the defendants. No proof was offered at trial with respect to the percentage fault of these defendants, and thus there was no assessment of their equitable share of the damages. It was impossible, therefore, to make a comparison between equitable share and actual settlement payment with respect to these defendants. The plaintiffs argued in *Williams,* as do the plaintiffs in the present case, that the set off for purposes of § 15-108 should be computed by aggregating the settlement payments and allocations of fault of all settling defendants.

The Court of Appeals rejected this method, finding that it created a false comparison since, in fact no equitable share had been determined as to the defendants who had settled prior to trial. The Court found that this had the practical effect of depriving the nonsettling defendant of all credit for the pretrial settlements. *See id.* at 444, 599 N.Y.S2d 519, 615 N.E.2d 1003. The Court adopted a two-step process for computing § 15-108 credits. In the first step all pretrial payments are subtracted from the verdict. The statutorily-required comparison between settlement payments and allocations of liability is then completed for the defendants for whom the jury had the opportunity to allocate fault. *Id.* at 441-45, 599 N.Y.S.2d 519, 615 N.E.2d 1003.

The method adopted by the Court of Appeals in *Williams* will be employed in the present case. As in *Williams,* the jury made no findings regarding the liability of certain parties from whom the plaintiffs received settlement payments. These settlement payments must be deducted from the verdict award prior to determining the amount of any further § 15-108 reductions due to settlements with parties for whom the jury has made a finding of percentage liability.

The defendants also contend that, for those defendants to whom the jury did allocate a percentage of responsibility, they should be allowed to apply § 15-108 on a tortfeasor-by-tortfeasor basis. Plaintiffs, on the other hand, claim that the defendants are entitled to an offset of the greater of the aggre-

gated amounts paid to them in settlement or the aggregated percentage shares of the settling tortfeasors. At the time that this issue was briefed by the parties, there had been no definitive statement on this issue from the New York Court of Appeals.

Since the time that the parties submitted their briefs the Court of Appeals has spoken directly on this issue. *In re New York County Asbestos Litig.*, 82 N.Y.2d 342, 604 N.Y.S.2d 884, 624 N.E.2d 979 (1993), involved an appeal by a non-settling defendant in a multi-defendant tort action arising out of the plaintiff's decedent's exposure to asbestos. Several of the defendants had settled prior to trial. The Court of Appeals addressed directly the question:

> [N]ot answered by the plain language of the statute . . . [of] [w]hich method for computing the amount of G.O.L. § 15–108(a) offset to the jury award should be adopted: 1) the case-by-case method, under which each settling defendant is taken separately and for that defendant, the amount of the settlement or the amount of the corresponding apportioned share, whichever is higher, is deducted from the verdict; or 2) the aggregate method, in which the settling tortfeasors are viewed collectively, the settlement amounts and the corresponding apportioned shares are totaled, and the offset is allowed for the greater of the two totals.

Id. 604 N.Y.S.2d at 885, 624 N.E.2d at 980.

The Court of Appeals adopted the aggregate method, whereby the verdict is reduced either by the total of the dollar amounts to be paid by the settling defendants or the total dollar amounts of their corresponding shares of the verdict, allocated in accordance with their apportioned liability, whichever is greater. *See also Pollicina v. Misericordia Hosp. Med. Ctr.*, 82 N.Y.2d 332, 604 N.Y.S.2d 879, 624 N.E.2d 974 (1993).

Federal courts are bound by the interpretation placed upon a state statute by the state's highest court. *O'Brien v. Skinner,*

414 U.S. 524, 531, 94 S.Ct. 740, 743, 38 L.Ed.2d 702 (1974); *Commissioner v. Estate of Bosch*, 387 U.S. 456, 464-65, 87 S.Ct. 1776, 1782, 18 L.Ed.2d 886 (1967); *Dunleavy v. Wilson*, 397 F.Supp. 670, 673 n. 13 (S.D.N.Y. 1975). As the New York Court of Appeals has now spoken on this issue, this Court is bound by their determination. With regard to the settling defendants for whom a percentage share of liability was determined by the jury, the defendants in the present case are entitled to the greater of the aggregate dollar settlements received or to be received by the plaintiffs from these defendants or the aggregate amounts of these defendants' corresponding shares of the verdict, allocated in accordance with their apportioned liability, which ever is greater.

Reallocation of Shares of Fault of Absent Parties

The jury in these cases allocated shares of fault to certain parties who were dismissed prior to trial, who were served but defaulted, who were not sued by the plaintiffs, or who are currently protected from suit by the bankruptcy statutes, parties which were referred to collectively as the "Non-Party Defendants." Several of the defendants contend that the shares of fault attributable to these parties should be redistributed among the settling and non-settling defendants according to their allocations of fault as determined by the jury.

However, established case law is to the contrary. In *In re Eastern & Southern Districts Asbestos Litigation*, 772 F.Supp. 1380 (E.D.N.Y.1991), Judge Weinstein considered the question of whether N.Y.G.O.L. § 15-108 requires a verdict to be reduced by the shares of fault attributed to bankrupt or non-party fault-sharers.

The court noted the weight of authority from a variety of jurisdictions in holding that the shares attributed to insolvent or otherwise unavailable parties should be absorbed by the non-settling defendants, and held that both equity and the law of New York dictated this result in this jurisdiction. *Id* at 1402-03. In upholding this decision, the Second Circuit noted

that nonsettling defendants who are allocated shares of the liability of absent parties retain the right to pursue reimbursement under Article 14 of the N.Y.C.P.L.R. *In re Brooklyn Navy Yard Asbestos Litig. (Joint E. & S. Dist. Asbestos Litig.)*, 971 F.2d 831, 845 (2d Cir.1992); *See also In re New York City Asbestos Litig.*, 188 AD.2d 214, 593 N.Y.S.2d 43 (N.Y.1993) (reversing trial court's allocation of bankrupt defendants' shares of liability among both settling and non-settling defendants and noting that non-settling defendants could seek relief through contribution actions), *aff'd*, 82 N.Y.2d 821, 605 N.Y.S.2d 3, 625 N.E.2d 588 (1993). The shares of liability allocated to the non-party defendants in the present case, therefore, will be re-allocated only among the non-settling defendants.

Interest on N.Y.G.O.L. Reductions

In *In re Brooklyn Navy Yard Asbestos Litig. (Joint Eastern & Southern Districts Asbestos Litigation)*, 971 F.2d 831, 852 (2d Cir.1992), the Second Circuit affirmed a computation of pre-judgment interest under N.Y.E.P.T.L. § 5-4.3(a) prior to subtracting N.Y.G.O.L. § 15-108 reductions. Since the decision in *Brooklyn Navy Yard*, however, the New York Appellate Division decided *In re New York City Asbestos Litigation*, 188 AD.2d 214, 225, 593 N.Y.S.2d 43 (N.Y.1993), *aff'd*, 82 N.Y.2d 821, 605 N.Y.S.2d 3, 625 N.E.2d 588 (1993). There, the Appellate Division held that "the calculation of interest from the date of death based upon the net verdict (as reduced for settlements pursuant to General Obligations Law § 15-108) is entirely consistent with the language of EPTL 5-4.3." *See also Frey v. Chester E. Smith & Sons, Inc.*, 751 F.Supp. 1062, 1055 56 (N.D.N.Y.1990) (interest calculated for purposes of E.P.T.L. § 5-4.3(a) after deducting amounts to which recovering plaintiff is not entitled); *accord Duffy v. New York*, 7 A.D.2d 988, 183 N.Y.S.2d 863, 864 (1959) (interest should be calculated on difference between verdict and settlement amount) (interpreting Decedent Estate Law § 132, later re-enacted as E.P.T.L. § 5-4.3).

The New York Court of Appeals has affirmed the opinion in *In re New York City Asbestos Litigation* for the reasons stated therein. *See* 82 N.Y2d 821, 605 N.Y.S.2d 3, 625 N.E.2d 588 (1993). As this decision now represents the position of New York's highest court on this issue of New York statutory law, it is binding on this court. *O'Brien v. Skinner,* 414 U.S. 524, 531, 94 S.Ct. 740, 743, 38 L.Ed.2d 702 (1974); *Commissioner v. Estate of Bosch,* 387 U.S. 456, 464-65, 87 S.Ct. 1776, 1782, 18 L.Ed.2d 886 (1967); *Dunleavy v. Wilson,* 397 F.Supp. 670, 673 n. 13 (S.D.N.Y.1975). When a conflict exists between holdings of the Second Circuit and more recent determinations of state appellate courts, the interpretation of the Circuit is not binding on federal district courts. *In re E. & S. Dists. Asbestos Litig.,* 772 F.Supp. 1380, 1391 (E.D.N.Y.1991).

In addition to the decisional law that contradicts the holding of the Second Circuit, it would be inequitable to require the non-settling defendants to pay interest on damages for which they were not responsible. Interest will be calculated in this case on the judgment after the deductions mandated by N.Y.G.O.L. § 15-108. Pre-verdict interest on an award for past losses that have accrued from the date of death to the date of the verdict will be calculated either on each item of damage from the date it was incurred or on all of such damages from some reasonable intermediate date, as prescribed in N.Y.C.P.L.R. 5001(b). *See Milbrandt v. A.P. Green Refractories Co.,* 79 N.Y.2d 26, 580 N.Y.S.2d 147, 588 N.E.2d 45 (1992).

N.Y.C.P.L.R. § 5041

Several issues are presented with regard to the application of New York's "nightmare"[4] statute, N.Y.C.P.L.R. § 5041.

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[4] That Section 5041 is "every judge's nightmare" is a refrain iterated, Poe-like, by judges from a variety of courts. *See, e.g., Singletary v. Three City Ctr.,* 601 N.Y.S.2d 649, 650 (Sup.Ct.1993); *Rohring v. City of Niagara Falls,* 153 Misc.2d 1001, 584 N.Y.S.2d 513, 515 (Sup.Ct.1992); *Daversa v. P.T.C. Props. Inc.,* 157 Misc.2d 854, 599 N.Y.S.2d 432, 434 (Civ.Ct.1993); *Sales v. Republic of Uganda,* 828 F.Supp. 1032, 1041 (S.D.N.Y. 1993); *In re Joint E. & S. Dists. Asbestos Litig.,* 798 F.Supp.

This statute prescribes the method for determining what judgment is to be entered on a verdict in an action to recover damages for personal injury or wrongful death under New York Law. Section 5041(e), which governs awards of future damages in excess of two hundred fifty thousand dollars, requires the defendant to purchase an annuity contract that will provide for the payment of such damages in periodic installments. Once the annual payment for the first year has been calculated, this subsection requires that the payments due in each succeeding year be computed by adding 4% to the previous year's payment.

Subsection 5041(c) requires that attorney's fees related to future periodically paid damages be paid in a lump sum based on the present value of the annuity contract purchased pursuant to subsection 5041(e).

When interpreting a state statute on which the state's highest court has not spoken, federal courts must give "proper regard" to the relevant rulings of state trial courts. *See Commissioner v. Estate of Bosch*, 387 U.S. 456, 465, 87 S.Ct. 1776, 1782, 18 L.Ed.2d 886 (1967). The New York Supreme Court has interpreted the calculation of attorney fees under Section 5041(c) to include the four percent annual increases required by Section 5041(e). *See, e.g., Marulli v. Pro Sec. Serv., Inc.*, 151 Misc.2d 1077, 583 N.Y.S.2d 870, 872 (Sup.Ct.App.Term 1992); *Ursini v. Sussman*, 143 Misc.2d 727, 541 N.Y.S.2d 916, 918 (Sup.Ct.1989).

This interpretation also comports with the language of the statute. Section 5041(c) provides that attorney's fees must be based on the present value of the annuity contract purchased to provide payment of future periodically paid damages pursuant to Subsection 5041(e). The annuity contract required by Subsection 5041(e) must be adequate to provide payments that include the 4% annual augmentations. In light of the opinions of the state courts interpreting this state statute and the congruence of this interpretation with the language of the

940, 961 (E.D.N.Y.1992), *rev'd*, 995 F.2d 343 (2d Cir.), *and rev'd*, 995 F.2d 346 (2d Cir.1993).

statute, the calculation of attorney fees required by Subsection 5041(c) in this case will include the 4% annual increases required by Subsection 5041(e).

The Discount Rate to be Applied in Annuity Calculations

N.Y.C.P.L.R. § 5041(e) provides that, with respect to future damages in excess of two hundred fifty thousand dollars:

> [T]he court shall enter a judgment for the amount of the present value of an annuity contract that will provide for the payment of the remaining amounts of future damages in periodic installments. The present value of such contract shall be determined in accordance with generally accepted actuarial practices by applying the discount rate in effect at the time of the award to the full amount of the remaining future damages . . . .

The parties in this action disagree with respect to the discount rate to be applied pursuant to Section 5041 and with respect to whether a different discount rate should be applied to each year of payment under the annuities or a fixed discount rate should be applied, ranging from 3.3% to 8.21% based on a variety of evidence such as prior reported cases, or averages of discount rates from the prior 14 years.

Section 5041 does not establish the discount rate that is to be used to reduce judgments of future damages to present value. Rather, it is left to individual courts to determine an appropriate rate. The Federal Government establishes a discount rate monthly through the Secretary of the United States Treasury Department who is required during each calendar month to determine the Federal short-term, mid-term and long-term rate which will apply during the following calendar month, *see* 26 U.S.C. § 1274(d)(1)(B), which is based on the average market yield during any one-month period ending in the calendar month in which the determination is made on outstanding marketable obligations of the United States with

remaining periods to maturity of appropriate periods, 26 U.S.C. § 1274(d)(1)(C).

The applicable Treasury Department rate is used by the Federal Government as a discount rate to determine whether a debt instrument given in consideration for the sale or exchange of property bears adequate stated interest, 26 U.S.C. § 1274(b)(2), and for the determination of the present values of future payments on the sale or exchange of property, 26 U.S.C. § 483(b), among other things. Several cases have used this rate as a guide when determining the appropriate discount rate for purposes of Section 6041. *See, e.g., Sales v. Republic of Uganda,* 828 F.Supp. 1032, 1047 n. 18 (S.D.N.Y.1993); *Peterson v. Zuercher,* 152 Misc.2d 684, 584 N.Y.S.2d 968, 971-72 (Sup.Ct.1992).

The short-term rate is the "applicable Federal rate" for debt instruments with a term of not over three years, the mid-term rate is the "applicable Federal Rate" for debt instruments with a term of over three years but not over nine years, and the long term rate is the "applicable Federal rate" for debt instruments with a term of over nine years. 26 U.S.C. § 1274(d)(1)(A).

The federal short-term rate for July, 1993, the month that the jury verdicts were announced in the present cases, ranged from 3.88% to 3.89% to 3.91% to 3.95%, depending on the compounding period. The federal long-term rate for July, 1993, ranged from 6.41% to 6.45% to 6.50% to 6.61%, depending on the compounding period. *See* I.R.S.Rev. Rul. 93-42, 1993-24 I.R.B. 57 (July 6, 1993). A discount rate of 3.91% will therefore be used for purposes of Section 5041 with regard to the determination of present values for loss periods of less than three years, and a rate of 6.49% will be used for purposes of Section 5041 with regard to the determination of present values for loss periods of more than nine years.[5]

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[5] There are no loss periods greater than three years and less than nine years in the present cases. *See* Pl.'s Rep.Mem. at 15.

These rates comport with a number of recent cases considering this issue. *See, e.g., Sales,* 828 F.Supp. at 1047 n. 18 (using U.S. Treasury discount rates for February and March, 1993, to establish 6% discount rate); *Doe v. State,* 189 AD.2d 199, 595 N.Y.S.2d 592 (1993) (6% discount rate); *Andrialis v. Snyder,* 603 N.Y.S.2d 670 (Sup.Ct.1993) (same). In addition, these rates fall between the rates suggested by the plaintiffs and the defendants. *Compare* Pl.'s Rep.Mem. on Verdict Molding at 15 (suggesting rates between 3.3% and 6.17%) *with id* at 14 (indicating that defendants have suggested rates ranging from 7% to 8.21%).

The parties also disagree regarding the calculations of the value of the annuities that must be purchased pursuant to Subsection 5041(e). This provision has been subject to conflicting interpretations by the lower New York courts. *See, e.g., Rohring v. City of Niagara Falls,* 192 A.D.2d 228, 601 N.Y.S.2d 740 (1993); *Ursini v. Sussman,* 143 Misc.2d 727, 541 N.Y.S.2d 916 (Sup.Ct.1989). The best approach is that applied by Justice Stander of the New York Supreme Court in *Singletary v. Three City Centre,* 601 N.Y.S.2d 649 (1993). Using *Singletary* as a guide, the application of § 5041 shall proceed as follows:

Starting with the jury's award for each element of future damages, net of the various set-offs described above, judgment in lump sum will be entered for future damages not in excess of $250,000.00. This lump sum judgment must "include the elements of future damages in the same proportion as such elements comprise of the total award for future damages." N.Y.C.P.L.R. § 5041(b).

The next step, determining attorney fees on future damages, encounters the oft-noted internal inconsistency in this Section. Subsection 5041(c) provides that these attorney fees must be "based on the present value of the annuity contract purchased to provide payment of such future periodically paid damages pursuant to subdivision (e)" of Section 5041. However, the present value of the annuity contract can only be determined after calculation of, *inter alia,* attorney's fees. Thus, "[w]ere

the statute to be literally interpreted it would not be possible to compute the attorney's fee until the present value of the annuity contract is determined and the present value of the annuity contract cannot be determined until the attorney's fee is calculated and deducted." *Marulli v. Pro Sec. Serv. Inc.*, 151 Misc.2d 1077, 583 N.Y.S.2d 870, 872 (Sup.Ct.App.Term 1992) (quoting *Ursini v. Sussman*, 143 Misc.2d 727, 731, 541 N.Y.S.2d 916 (N.Y.Sup.Ct.1989)). Consistent with the opinions of several New York State courts, this Gordian knot will be cut by performing two calculations: "[a] calculation of the attorney's fee based on a determination of the present value prior to the deduction of the attorney's fee and a second calculation to determine to future payments to the plaintiff after deduction of the attorney's fee." *Marulli v. Pro Sec. Serv. Inc.*, 151 Misc.2d 1077, 1079, 583 N.Y.S.2d 870 (Sup.Ct.App.Term 1992) (quoting *Ursini v. Sussman*, 143 Misc.2d 727, 731, 541 N.Y.S.2d 916 (N.Y.Sup.Ct.1989)).

To arrive at the first amount, the attorney's fee on future, periodically paid damages in excess of $250,000.00, the future value of each plaintiff's net future damages award must be determined.[6] As indicated by the retainer agreements submitted by the plaintiffs' attorney, the attorney's fee is 1/3 of this future value amount. This future value of the attorney fees must then be converted to present value, using the discount rates prescribed above.

The second calculation will be performed as follows. The future value of the attorney's fee must be subtracted from the future value of the damages award to obtain the sum to be paid through future periodic payments to the plaintiffs. This amount must then be converted to present value pursuant to Subsection 5041(e) to determine the amount to be entered as judgment for the plaintiffs. The required annuity contract shall be purchased from any qualified insurer approved by New York's Superintendent of Insurance, subject to Court approval.

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[6] As discussed *supra*, this will include the 4% yearly increases required by Subsection 5041(e).

Conclusion

Settle judgment on notice in accordance with this opinion within two weeks.

It is so ordered.

APPENDIX A

July 22, 1993

SPECIAL VERDICT FORM: TABOLT CASE

1. Were the asbestos-containing products manufactured by Flintkote defective or unsafe?

Yes ✓ No _____

Proceed to Question 2.

2. Did Flintkote fail to use reasonable care in respect to the foreseeable use in preparing, marketing, or warning or failing to warn about its asbestos-containing product?

Yes ✓ No _____

If you answered both Questions 1 and 2 "No", proceed to the STOP instruction at the end of this form. If you answered "Yes" to either or both Question 1 or Question 2, proceed to Question 3.

3. Was Vincent Tabolt exposed to Flintkote's asbestos-containing products?

Yes ✓ No _____

If you answered "No" to this question, proceed to the STOP instruction at the end of this form. If you answered "Yes" to this Question, proceed to Question 4.

4. Was the exposure to Flintkote's asbestos-containing products a proximate cause of Vincent Tabolt's death?

Yes ✓ No _____

If you answered "No" to this Question, proceed to the STOP instruction at the end of this form. If you answered "Yes" to this Question, proceed to Question 5.

5. State the damages, if any, resulting from the pain and suffering of Vincent Tabolt and wages lost before his death and Sharon Tabolt's claim for loss of consortium due to Vincent Tabolt's mesothelioma.

a) Vincent Tabolt's pain and suffering $7,500,000

b) Vincent Tabolt's lost wages prior to death $ 50,000

c) Sharon Tabolt's loss of consortium $3,750,000

Proceed to Question 6.

6. State the damages, if any, to Mrs. Tabolt arising out of Vincent Tabolt's death with respect to the following:

a) Funeral expenses $ 6,116

b) Wages which Vincent Tabolt would have contributed to his wife from death to the present. $ 22,000

c) Wages which Vincent Tabolt would have contributed to his wife from today for as long as he would have continued to work (undiscounted) $1,700,000

How many years 22

d) Loss of services to Mrs. Tabolt from the time of his death to the present $ 5,600

e) Loss of services to Mrs. Tabolt in the future (undiscounted) $ 507,072

Number of years 27.2

7. Were the asbestos-containing products manufactured by the following companies defective or unsafe?

a) A.P. Green	Yes ✓	No
b) GAF Corporation	Yes ✓	No
c) Armstrong World Ind.	Yes ✓	No
d) Georgia-Pacific	Yes ✓	No
e) Rutland	Yes ✓	No
f) U.S. Gypsum	Yes ✓	No
g) W.R. Grace	Yes ✓	No

Proceed to Question 8.

8. Did the following companies fail to use reasonable care with respect to foreseeable use in producing, marketing, or warning about their asbestos-containing products?

a) A.P. Green	Yes ✓	No _____
b) GAF Corporation	Yes ✓	No _____
c) Armstrong World Ind.	Yes ✓	No _____
d) Georgia-Pacific	Yes ✓	No _____
e) Rutland	Yes ✓	No _____
f) U.S. Gypsum	Yes ✓	No _____
g) W.R. Grace	Yes ✓	No _____

If you answered "Yes" to either or both Questions 7 and 8, for any company listed proceed to Question 9. If you answered both Questions 7 and 8 "No" as to any company, strike that company from those listed at Question 11.

9. Was Vincent Tabolt exposed to the following companies' asbestos-containing products?

a) A.P. Green	Yes ✓	No _____
b) GAF Corporation	Yes ✓	No _____
c) Armstrong World Ind.	Yes ✓	No _____
d) Georgia-Pacific	Yes ✓	No _____
e) Rutland	Yes _____	No ✓
f) U.S. Gypsum	Yes ✓	No _____
g) W.R. Grace	Yes ✓	No _____

If you answered Question 9 "Yes" for any company listed, proceed to Question 10. If you answered Question 9 "No" for any company, strike that company from those listed at 11.

10. Did the exposure to the asbestos-containing products of any of the following companies proximately cause Vincent Tabolt's mesothelioma?

a) A.P. Green	Yes ✓	No _____
b) GAF Corporation	Yes ✓	No _____
c) Armstrong World Ind.	Yes ✓	No _____

d) Georgia-Pacific	Yes ✓	No _____
e) Rutland	Yes _____	No ✓
f) U.S. Gypsum	Yes ✓	No _____
g) W.R. Grace	Yes ✓	No _____

If you Answered "No" to this Question for any company, strike that company from those listed at Question 13 unless it has already been stricken in accordance with these instructions. Proceed to Question 11.

11. Determine the percentage which represents the relative share of the responsibility of each entity arising out of Vincent Tabolt's mesothelioma. The total must be 100%. Do not assign a percentage to any company whose name has been crossed out in accordance with these instructions.

a) Flintkote	21%
b) A.P. Green	19%
c) GAF Corporation	gcm5%
d) Armstrong World Ind.	gcm0%
e) Georgia-Pacific	15%
e) Rutland	0%
g) U.S. Gypsum	30%
h) W.R. Grace	10%
Total	100%

12. Was the conduct of defendant Flintkote reckless disregard for the safety of others?

Yes ✓ No _____

13. Did defendant Flintkote act knowingly and in concert to cause the acts upon which any liability is based?

Yes ✓ No _____

STOP: Sign the form and advise the Marshal that you have reached a verdict.

JEFFREY [ILLEGIBLE]
Foreperson

APPENDIX B

SPECIAL VERDICT FORM: CONSORTI CASE

1. Were the asbestos-containing products manufactured or distributed by any of the following companies defective or unsafe?

a) Atlas Turner	Yes ✓	No _____
b) Fibreboard	Yes ✓	No _____
c) Keene	Yes ✓	No _____
d) Owens-Corning Fiberglas	Yes ✓	No _____
e) Porter-Hayden	Yes ✓	No _____

Proceed to Question 2.

2. Did any of the following companies fail to use reasonable care in respect to the foreseeable use in preparing, marketing, or warning or failing to warn about its asbestos-containing product?

a) Atlas Turner	Yes ✓	No _____
b) Fibreboard	Yes ✓	No _____
c) Keene	Yes ✓	No _____
d) Owens-Corning Fiberglas	Yes ✓	No _____
e) Porter-Hayden	Yes ✓	No _____

If you answered both Questions 1 and 2 "No" for all defendants listed, proceed to the STOP instruction at the end of this form. If you answered both Questions 1 and 2 "No" as to any defendant(s), go to Questions 3, 4, 12, 13, and 14 and strike that defendant(s)' name from the list at each. If you answered "Yes" to either or both Question 1 or Question 2, for any defendant listed proceed to Question 3.

3. Was John Consorti exposed to the asbestos-containing products manufactured or distributed by the following companies?

a) Atlas Turner	Yes	✓	No	
b) Fibreboard	Yes	✓	No	
c) Keene	Yes	✓	No	
d) Owens-Corning Fiberglas	Yes	✓	No	
e) Porter-Hayden	Yes	✓	No	

If you answered "No" to this Questlon for all defendants listed proceed to the STOP instruction at the end of this form. If you answered "No" to this Question in regard to any defendant(s), go to Questions 4, 12, 13 and 14 and strike that defendant(s)' name from the list at each. If you answered "Yes" to this Question for any defendant listed, proceed to Question 4.

4. Was the exposure to any of the following companies' asbestos-containing products a proximate cause of John Consorti's mesothelioma?

a) Atlas Turner	Yes	✓	No	
b) Fibreboard	Yes	✓	No	
c) Keene	Yes	✓	No	
d) Owens-Corning Fiberglas	Yes	✓	No	
e) Porter-Hayden	Yes	✓	No	

If you answered "No" to this Question for all defendants listed, proceed to the STOP instruction at the end of this form. If you answered "No" to this Question in regard to any defendant(s), go to Questions 12, 13 and 14 and strike that defendant(s)' name from the list at each. If you answered "Yes" to this Question for any defendant listed, proceed to Question 5.

5. State the damages, if any, resulting from the pain and suffering of John Consorti and wages lost and Frances Consorti's claim for loss of consortium due to John Consorti's mesothelioma.

a) John Consorti's pain and suffering to date; $8,000,000

b) John Consorti's pain and suffering in the future; $4,000,000

How many years? 9 months

c) John Consorti's lost wages to date; $ 137,800

d) John Consorti's lost wages in the the future (undiscounted); $1,352,156

How many years? 14

e) Past medical expenses; $ 100,000

f) Future medical and funeral expenses; $ 47,500

How many years? 9 months

g) Frances Consorti's lost consortium; $2,000,000

h) Frances Consorti's lost consortium in the future:

Economic gcm$912,705

How many years? gcm14 yrs.

Non-Economic $4,000,000

How many years? gcm26.2

Proceed to Question 6.

6. Were the asbestos-containing products manufactured or distributed by the following companies defective or unsafe?

a) American Insulation Yes ✓ No ____
b) Anchor Packing Co. Yes ✓ No ____
c) Combustion Engineering, Inc. Yes ✓ No ____
d) Consolidated Edison of NY, Inc. Yes ✓ No ____
e) Crown, Cork & Seal Co., Inc. Yes ✓ No ____
f) Eagle-Pitcher Indus. Inc. Yes ✓ No ____

g) Empire-Ace Insulation Mfg. Co. Yes ✓ No ____
h) GAF Corporation Yes ✓ No ____
i) General Dynamics Corporation Yes ✓ No ____
j) Janos Asbestos Insulation Co. Yes ✓ No ____
k) Johns-Manville Corporation Yes ✓ No ____
l) King Insulation Co. Yes ✓ No ____
m) New York Protective Co. Yes ✓ No ____
n) New York Twine Yes ✓ No ____
o) Nicolet, Inc. Yes ✓ No ____
p) Owens-Illinois, Inc. Yes ✓ No ____
q) Phillip Carey, Inc. Yes ✓ No ____
r) Pittsburgh-Corning Corp. Yes ✓ No ____
s) Robert A Keasbey Co. Yes ✓ No ____
t) Richmond Co. Yes ✓ No ____
u) Southern-Asbestos/ H.K. Porter Yes ✓ No ____
v) S.W. Anderson Inc. Yes ✓ No ____
w) Standard Asbestos/ Insulation Yes ✓ No ____
x) State Insulation Co. Yes ✓ No ____
y) U.S. Rubber, aka Uniroyal, Inc. Yes ✓ No ____
z) Unarco Yes ✓ No ____

Proceed to Question 7.

7. Did the following companies fail to use reasonable care with respect to foreseeable use in preparing, marketing, or warning or failing to warn about their asbestos-containing products?

a) American Insulation Yes ✓ No ____
b) Anchor Packing Co. Yes ✓ No ____
c) Combustion Engineering, Inc. Yes ✓ No ____
d) Consolidated Edison of NY, Inc. Yes ✓ No ____

~~e) Crown, Cork & Seal Co., Inc.~~	~~Yes~~	~~No~~
f) Eagle-Pitcher Indus. Inc.	Yes ✓	No
g) Empire-Ace Insulation Mfg. Co.	Yes ✓	No
h) GAF Corporation	Yes ✓	No
i) General Dynamics Corporation	Yes ✓	No
j) Janos Asbestos Insulation Co.	Yes ✓	No
k) Johns-Manville Corporation	Yes ✓	No
l) King Insulation Co.	Yes ✓	No
m) New York Protective Co.	Yes ✓	No
n) New York Twine	Yes ✓	No
~~o) Nicolet, Inc.~~	~~Yes~~	~~No~~
p) Owens-Illinois, Inc.	Yes ✓	No
q) Phillip Carey, Inc.	Yes ✓	No
r) Pittsburgh-Corning Corp.	Yes ✓	No
s) Robert A Keasbey Co.	Yes ✓	No
t) Richmond Co.	Yes ✓	No
u) Southern-Asbestos/ H.K. Porter	Yes ✓	No
v) S.W. Anderson Inc.	Yes ✓	No
w) Standard Asbestos/ Insulation	Yes ✓	No
x) State Insulation Co.	Yes ✓	No
y) U.S. Rubber, aka Uniroyal, Inc.	Yes ✓	No
z) Unarco	Yes ✓	No

If you answered "Yes" to either or both Questions 6 and 7, for any of the companies listed proceed to Question 8. If you answered both Questions 6 and 7 "No", for any company strike that company from the list at Questions 8, 9 and 12.

8. Was John Consorti exposed to the following companies' asbestos-containing products?

a) American Insulation	Yes	✓	No	
b) Anchor Packing Co.	Yes	✓	No	
c) Combustion Engineering, Inc.	Yes	✓	No	
d) Consolidated Edison of NY, Inc.	Yes	✓	No	
~~e) Crown, Cork & Seal Co., Inc.~~	~~Yes~~		~~No~~	
f) Eagle-Pitcher Indus. Inc.	Yes	✓	No	
g) Empire-Ace Insulation Mfg. Co.	Yes	✓	No	
h) GAF Corporation	Yes	✓	No	
i) General Dynamics Corporation	Yes	✓	No	
j) Janos Asbestos Insulation Co.	Yes	✓	No	
k) Johns-Manville Corporation	Yes	✓	No	
l) King Insulation Co.	Yes	✓	No	
m) New York Protective Co.	Yes	✓	No	
n) New York Twine	Yes	✓	No	
~~o) Nicolet, Inc.~~	~~Yes~~		~~No~~	
p) Owens-Illinois, Inc.	Yes	✓	No	
q) Phillip Carey, Inc.	Yes	✓	No	
r) Pittsburgh-Corning Corp.	Yes	✓	No	
s) Robert A Keasbey Co.	Yes	✓	No	
t) Richmond Co.	Yes	✓	No	
u) Southern-Asbestos/ H.K. Porter	Yes	✓	No	
v) S.W. Anderson Inc.	Yes	✓	No	
w) Standard Asbestos/ Insulation	Yes	✓	No	
x) State Insulation Co.	Yes	✓	No	
y) U.S. Rubber, aka Uniroyal, Inc.	Yes	✓	No	
z) Unarco	Yes	✓	No	

If you answered Question 8 "Yes" for any of the companies listed, proceed to Question 9. If you answered

Question 8 "No" for any company, strike that company from the list at Questions 9 and 12.

9. Did the exposure to the asbestos-containing products of any of the following companies proximately cause John Consorti's mesothelioma?

a) American Insulation	Yes ✓	No
b) Anchor Packing Co.	Yes ✓	No
c) Combustion Engineering, Inc.	Yes ✓	No
d) Consolidated Edison of NY, Inc.	Yes ✓	No
~~e) Crown, Cork & Seal Co., Inc.~~	~~Yes~~	~~No~~
f) Eagle-Pitcher Indus. Inc.	Yes ✓	No
g) Empire-Ace Insulation Mfg. Co.	Yes ✓	No
h) GAF Corporation	Yes ✓	No
i) General Dynamics Corporation	Yes ✓	No
j) Janos Asbestos Insulation Co.	Yes ✓	No
k) Johns-Manville Corporation	Yes ✓	No
l) King Insulation Co.	Yes ✓	No
m) New York Protective Co.	Yes ✓	No
n) New York Twine	Yes ✓	No
~~o) Nicolet, Inc.~~	~~Yes~~	~~No~~
p) Owens-Illinois, Inc.	Yes ✓	No
q) Phillip Carey, Inc.	Yes ✓	No
r) Pittsburgh-Corning Corp.	Yes ✓	No
s) Robert A Keasbey Co.	Yes ✓	No
t) Richmond Co.	Yes ✓	No
u) Southern-Asbestos/ H.K. Porter	Yes ✓	No
v) S.W. Anderson Inc.	Yes ✓	No
w) Standard Asbestos/ Insulation	Yes ✓	No
x) State Insulation Co.	Yes ✓	No

y) U.S. Rubber, aka Uniroyal, Inc. Yes ✓ No _____
z) Unarco Yes ✓ No _____

If you answered "No" to this Question for any company, strike that company from the list at Question 12 unless it has already been stricken in accordance with these instructions.

Proceed to Question 10.

10. Did any of the following third-party defendants or non-party defendants listed below fail to use reasonable care in providing a safe workplace?

a) Veteran Pipe Covering Yes _____ No ✓
b) State Pipe Covering Yes _____ No ✓
c) Marine Pipe Covering Yes _____ No ✓

If you answered this Question "No" as to any third-party or non-party defendant, strike the name of that party or non-party defendant from the list of defendants in Questions 11 and 12.

Proceed to Question 11.

11. Was the failure of the following companies to use reasonable care in providing a safe workplace a proximate cause of John Consorti's mesothelioma?

a) Veteran Pipe Covering Yes _____ No ✓
b) State Pipe Covering Yes _____ No ✓
c) Marine Pipe Covering Yes _____ No ✓

If you answered this Question "No" as to any third-party or non-party defendant, strike the name of that party or non-party defendant from the list of defendants in Question 12.

Proceed to Question 12.

12. Determine the percentage which represents the relative share of the responsibility of each entity arising out of John

Consorti's mesothelioma. The total must be 100%. Do not assign a percentage to any company whose name has been crossed out in accordance with these instructions.

a)	Atlas Turner	1%
b)	Fibreboard	10%
c)	Keene	6%
d)	Owens-Corning Fiberglas	7%
e)	Porter Hayden	3%
~~f)~~	~~Veteran Pipe Covering~~	~~%~~
~~g)~~	~~State Pipe Covering~~	~~%~~
~~h)~~	~~Marine Pipe Covering~~	~~%~~
i)	American Insulation	0.5%
j)	Anchor Packing Co.	2%
k)	Combustion Engineering, Inc.	0.5%
l)	Consolidated Edison of NY, Inc.	1%
~~m)~~	~~Crown, Cork & Seal Co., Inc.~~	~~%~~
n)	Eagle-Pitcher Indus. Inc.	5%
o)	Empire-Ace Insulation Mfg. Co.	3%
p)	GAF Corporation	5%
q)	General Dynamics Corporation	2%
r)	Janos Asbestos Insulation Co.	3.5%
s)	Johns-Manville Corporation	10%
t)	Ring Insulation Co.	1%
u)	New York Protective Co.	2%
v)	New York Twine	1%
~~w)~~	~~Nicolet, Inc.~~	~~%~~
v)	Owens-Illinois, Inc.	2%
y)	Phillip Carey, Inc.	4%
x)	Pittsburgh-Corning Corp.	3%
aa)	Robert A Reasbey Co.	0.5%
bb)	Richmond Co.	5%
cc)	Southern-Asbestos/H.K. Porter	2%
dd)	S.W. Anderson Inc.	5%
ee)	Standard Asbestos/Insulation	3%
ff)	State Insulation Co.	2%
gg)	U.S. Rubber, aka Uniroyal, Inc.	5%
hh)	Unarco	5%
Total		100%

13. Was the conduct of any of the following companies reckless disregard for the safety of others? Do not consider any company whose name has been crossed out in accordance with these instructions.

a)	Atlas Turner	Yes	✓	No _____
b)	Fibreboard	Yes	✓	No _____
c)	Keene	Yes	✓	No _____
d)	Owens-Corning Fiberglas	Yes	✓	No _____
e)	Porter-Hayden	Yes	✓	No _____

14. Did any of the following companies act knowingly and in concert to cause the acts upon which any liability is based? Do not consider any company whose name has been crossed out in accordance with these instructions.

a)	Atlas Turner	Yes	✓	No _____
b)	Fibreboard	Yes	✓	No _____
c)	Keene	Yes	✓	No _____
d)	Owens-Corning Fiberglas	Yes	✓	No _____

STOP: Sign the form and advise the Marshal-that you have reached a verdict.

JEFFREY [ILLEGIBLE]
Foreperson

APPENDIX C

July 22, 1993 CORRECT VERSION

SPECIAL VERDICT FORM: LUCHNICK CASE

1. Were the asbestos-containing products nanufactured by either of the defendants listed below defective or unsafe?

Fibreboard Corporation	Yes ✓	No _____
Keene Corporation	Yes ✓	No _____

Proceed to Question 2.

2. Did either of the defendants listed below fail to use reasonable care in respect of foreseeable use in marketing, perparing, warning or failing to warn about their asbestos-containing products?

Fibreboard Corporation	Yes ✓	No _____
Keene Corporation	Yes ✓	No _____

If you answered both Questions 1 and 2 "No" as to both defendants, proceed to the STOP instruction at the end of this form. If you answered both Questions 1 and 2 "No" as to either defendant, go to Questions 3, 4, 12, 13 and 14 and strike that defendant's name from the list at each. If you answered "Yes" in regard to either defendant on either or both Question 1 or Question 2, proceed to Question 3.

3. Was Alfred Luchnick exposed to asbestos—containing products of either of the defendants?

Fibreboard Corporation	Yes ✓	No _____
Keene Corporation	Yes ✓	No _____

If you answered "No" to this Question in regard to both defendants, proceed to the STOP instruction at the end of this form. If you answered "No" to this question in regard to any one defendant, go to Questions 4, 12, 13

and 14 and strike that defendant's name from the list at each. If you answered "Yes" in regard to either defendant, proceed to Question 4.

4. Was the exposure to either of these defendants' asbestos-containing products a proximate cause of Alfred Luchnick's mesotheliona?

Fibreboard Corporation	Yes ✓	No _____
Keene Corporation	Yes ✓	No _____

If you answered "No" to this Question as to both defendants, proceed to the STOP instruction at the end of this form. If you answered "No" to this Question in regard to either defendant, go to Questions 12, 13 and 14 and strike that defendant's name from the list at each. If you answered "Yes" to this Question as to either defendant, proceed to Question 5.

Damages

5. State the economic damages, if any, to Alfred Luchnick and to his family arising out of his death with respect to the following:

a) Funeral expenses $ 9,951

b) Loss of services to Mrs. Luchnick from the time of his death to the present $ 8,000

c) Loss of services to Mrs. Luchnick in the future (undiscounted) $228,000

How many years? 19

Proceed to Question 6.

6. State the noneconomic damages, if any, to the Luchnicks arising out of Alfred Luchnick's death with respect to the following:

d) Alfred Luchnick's pain and suffering $3,000,000

e) Loss of consortium to Joselyn Luchnick during the course of his illness $1,400,000

Proceed to Question 7.

Non-Party Manufacturers

7. Were the asbsetos-containing products manufactured by any of non-party defandants listed below defective or unsafe?

a. Anchor Packing	Yes ✓	No ____
b. Armstrong World Indus, Inc.	Yes ✓	No ____
c. Combusion Engineering, Inc.	Yes ✓	No ____
d. Eagle-Pitcher	Yes ✓	No ____
e. Flexitallic	Yes ✓	No ____
f. GAF Corporation	Yes ✓	No ____
g. Garlock	Yes ✓	No ____
h. Johns-Mansville	Yes ✓	No ____
i. Kentile	Yes ✓	No ____
j. Keasbey & Madison	Yes ✓	No ____
k. Nicolet	Yes ✓	No ____
l. Owens-Illinois, Inc.	Yes ✓	No ____
m. Phillip Carey	Yes ✓	No ____
n. Raybestos Manhattan	Yes ✓	No ____
o. Unarco	Yes ✓	No ____

Proceed to Question 8.

8. Did any of the non-party defendants listed below fail to use reasonable care in respect of foreseeable use in marketing, preparing, warning or failing to warn about asbestos?

a. Anchor Packing	Yes ✓	No ____
b. Armstrong World Indus, Inc.	Yes ✓	No ____
c. Combusion Engineering, Inc.	Yes ✓	No ____
d. Eagle-Pitcher	Yes ✓	No ____
e. Flexitallic	Yes ✓	No ____
f. GAF Corporation	Yes ✓	No ____
g. Garlock	Yes ✓	No ____

h. Johns-Mansville	Yes	✓	No	
i. Kentile	Yes	✓	No	
j. Keasbey & Madison	Yes	✓	No	
k. Nicolet	Yes	✓	No	
l. Owens-Illinois, Inc.	Yes	✓	No	
m. Phillip Carey	Yes	✓	No	
n. Raybestos Manhattan	Yes	✓	No	
o. Unarco	Yes	✓	No	

If you answered both Questions 7 and 8 "No" as to all non-party defendants, proceed to Question 11. If you answered both Questions 7 and 8 "No" as to any non-party defendant, go to Questions 9, 10, and 12 and strike that defendant's name from the list at each. If you answered "Yes" in regard to any non-party defendant on either or both Question 7 or Question 8, proceed to Question 9.

9. Was Alfred Luchnick exposed to any of these non-party defendants' asbestos-containing products?

a. Anchor Packing	Yes	✓	No	
b. Armstrong World Indus, Inc.	Yes	✓	No	
c. Combusion Engineering, Inc.	Yes		No	✓
d. Eagle-Pitcher	Yes	✓	No	
e. Flexitallic	Yes	✓	No	
f. GAF Corporation	Yes	✓	No	
g. Garlock	Yes	✓	No	
h. Johns-Mansville	Yes	✓	No	
i. Kentile	Yes	✓	No	
j. Keasbey & Madison	Yes	✓	No	
k. Nicolet	Yes		No	✓
l. Owens-Illinois, Inc.	Yes	✓	No	
m. Phillip Carey	Yes	✓	No	
n. Raybestos Manhattan	Yes	✓	No	
o. Unarco	Yes	✓	No	

If you answered "No" to this Question in regard to all non-party defendants, proceed to Question 11. If you

ansered "No" to this Question in regard as to any non-party defendant, go to Questions 10 and 12 and strike that defendant's name from the list at each. If you answered "Yes" in regard to any defendant, proceed to Question 10.

10. Did the exposure to any of the asbestos-containing products of the non-party defendants cause Alfred Luchnick's mesothelioma?

a. Anchor Packing	Yes ✓	No ____
b. Armstrong World Indus, Inc.	Yes ✓	No ____
~~c. Combustion Engineering, Inc.~~	~~Yes~~	~~No~~
d. Eagle-Pitcher	Yes ✓	No ____
e. Flexitallic	Yes ✓	No ____
f. GAF Corporation	Yes ✓	No ____
g. Garlock	Yes ✓	No ____
h. Johns-Mansville	Yes ✓	No ____
i. Kentile	Yes ✓	No ____
j. Keasbey & Madison	Yes ✓	No ____
~~k. Nicolet~~	~~Yes~~	~~No~~
l. Owens-Illinois, Inc.	Yes ✓	No ____
m. Phillip Carey	Yes ✓	No ____
n. Raybestos Manhattan	Yes ✓	No ____
o. Unarco	Yes ✓	No ____

If you answered "No" to this Question as to all non-party defendants, just proceed to Question 11. If you answered "No" to this Question in regard to any non-party defendant, go to Question 12 and strike that defendant's name from the list. Proceed to Question 11.

11. Did the negligence of the United States Navy (Brooklyn navy Yard) proximately cause his mesothelioma?

Yes ✓ No ____

12. Determine the percentage which represents the relative share of the responsibility of each direct defendant and non-party defendant arising out of Alfred Luchnick's

mesothelioma. The total must be 100%. Do not assign a percentage to any company whose name has been crossed out in accordance with these instructions.

a. Fibreboard Corporation	7.5%
b. Keene Corporation	7.5%
c. Anchor Packing	3%
d. Armstrong World Indus, Inc.	2%
~~e. Combusion Engineering, Inc.~~	~~—%~~
f. Eagle-Pitcher	10%
g. Flexitallic	1%
h. GAF Corporation	4%
i. Garlock	2%
j. Johns-Mansville	15%
k. Kentile	1%
l. Keasbey & Madison	5%
~~m. Nicolet~~	~~—%~~
n. Owens-Illinois, Inc.	10%
o. Phillip Carey	10%
p. Raybestos Manhatten	6%
q. Unarco	6%
r. United States (Brooklyn Navy Yard)	10%
Total	100%

13. Was the conduct of any of the following defendants in reckless disregard for the safety of others? Do not consider a company whose name has been corssed out in accordance with these instructions.

a) Fibreboard Yes ✓ No _____

b) Keene Corporation Yes ✓ No _____

14. Did any of the following defendants act knowingly and in concert to cause the acts upon which liability is based? Do not consider a company whose name has been crossed out in accordance with these instuctions.

a) Fibreboard Yes ✓ No _____

b) Keene Corporation Yes ✓ No _____

STOP: Sign the form and advise the Marshal that you have reached a verdict.

JEFFREY [ILLEGIBLE]
Foreperson

APPENDIX D

SPECIAL VERDICT FORM: PULIZZI CASE

1. Were the asbestos-containing products manufactured by either of the defendants listed below defective or unsafe?

Fibreboard Corporation	Yes ✓	No _____
Keene Corporation	Yes ✓	No _____

Proceed to Question 2.

2. Did either of the defendants listed below fail to use reasonable care in respect of foreseeable use in marketing, perparing, warning or failing to warn about their asbestos-containing products?

Fibreboard Corporation	Yes ✓	No _____
Keene Corporation	Yes ✓	No _____

If you answered both Questions 1 and 2 "No" as to both defendants, proceed to the STOP instruction at the end of this form. If you answered both Questions 1 and 2 "No" as to either defendant, go to Questions 3, 4, 12, 13 and 14 and strike that defendant's name from the list at each. If you answered "Yes" in regard to either defendant on either or both Question 1 or Question 2, proceed to Question 3.

3. Was Peter Pulizzi exposed to asbestos-containing products of either of the defendants?

Fibreboard Corporation	Yes ✓	No _____
Keene Corporation	Yes ✓	No _____

If you answered "No" to this Question in regard to both defendants, proceed to the STOP instruction at the end of this form. If you answered "No" to this question in regard to any one defendant, go to Questions 4, 12, 13

and 14 and strike that defendant's name from the list at each. If you answered "Yes" in regard to either defendant, proceed to Question 4.

4. Was the exposure to either of these defendants' asbestos-containing products a proximate cause of Peter Pulizzi's mesothelioma?

Fibreboard Corporation	Yes ✓	No _____
Keene Corporation	Yes ✓	No _____

If you answered "No" to this Question as to both defendants, proceed to the STOP instruction at the end of this form. If you answered "No" to this Question in regard to either defendant, go to Questions 12, 13 and 14 and strike that defendant's name from the list at each. If you answered "Yes" to this Question as to either defendant, proceed to Question 5.

Damages

5. State the economic damages, if any, to Peter Pulizzi and to his family arisinq out of his death with respect to the following:

a) Funeral expenses $ 10,000

b) Loss of services to Mrs. Pulizzi from the time of his death to the present $ 12,000

c) Loss of services to Mrs. Pulizzi in the future (undiscounted) $200,000

How many years? 11

Proceed to Question 6.

6. State the noneconomic damages, if any, to the Pulizzis arising out of Peter Pulizzi's death with respect to the following:

d) Peter Pulizzi's pain and suffering $5,500,000

e) Loss of consortium to Anne Pulizzi during the course of his illness $2,700,000

Proceed to Question 7.

Non-Party Manufacturers

7. Were the asbestos-containing products manufactured by any of the non-party defendants listed below defective or unsafe?

a. Anchor Packing	Yes ✓	No
b. Armstrong World Indus. Inc.	Yes ✓	No
c. Combusion Engineering, Inc.	Yes	No ✓
d. Eagle-Pitcher	Yes ✓	No
e. Flexitallic	Yes ✓	No
f. GAF Corporation	Yes ✓	No
g. Garlock	Yes ✓	No
h. Johns-Mansville	Yes ✓	No
i. Kentile	Yes ✓	No
j. Keasbey & Madison	Yes ✓	No
k. Lorillard Corporation	Yes	No ✓
l. Nicolet	Yes	No ✓
m. Owens-Illinois, Inc.	Yes ✓	No
n. Phillip Carey,	Yes ✓	No
o. Raybestos Manhatten,	Yes ✓	No
p. Unarco	Yes ✓	No

Proceed to Question 8.

8. Did any of the non-party defendants listed below fail to use reasonable care in respect of foreseeable use in marketing, preparing, warning or failing to warn about asbestos?

a. Anchor Packing	Yes ✓	No
b. Armstrong World Indus. Inc.	Yes ✓	No
c. Combusion Engineering, Inc.	Yes	No ✓
d. Eagle-Pitcher	Yes ✓	No
e. Flexitallic	Yes ✓	No

f. GAF Corporation	Yes ✓	No ____
g. Garlock	Yes ✓	No ____
h. Johns-Mansville	Yes ✓	No ____
i. Kentile	Yes ✓	No ____
j. Keasbey & Madison	Yes ✓	No ____
k. Lorillard Corporation	Yes ____	No ✓
l. Nicolet	Yes ____	No ✓
m. Owens-Illinois, Inc.	Yes ✓	No ____
n. Phillip Carey	Yes ✓	No ____
o. Raybestos Manhatten,	Yes ✓	No ____
p. Unarco	Yes ✓	No ____

If you answered both Questions 7 and 8 "No" as to all non-party defendants, proceed to Question 11. If you answered both Questions 7 and 8 "No" as to any non-party defendant, go to Questions 9, 10 and 12 and strike that defendant's name from the list at each. If you answered "Yes" in regard to any non-party defendant on either or both Question 7 or Question 8, proceed to Question 9.

9. Was Peter Pulizzi exposed to any of these non-party defendants' asbestos-containing products?

a. Anchor Packing	Yes ✓	No ____
b. Armstrong World Indus. Inc.	Yes ✓	No ____
~~c. Combustion Engineering, Inc.~~	~~Yes ____~~	~~No ____~~
d. Eagle-Pitcher	Yes ✓	No ____
e. Flexitallic	Yes ✓	No ____
f. GAF Corporation	Yes ✓	No ____
g. Garlock	Yes ✓	No ____
h. Johns-Mansville	Yes ✓	No ____
i. Kentile	Yes ✓	No ____
j. Keasbey & Madison	Yes ✓	No ____
~~k. Lorillard Corporation~~	~~Yes ____~~	~~No ____~~
~~l. Nicolet~~	~~Yes ____~~	~~No ____~~
m. Owens-Illinois, Inc.	Yes ✓	No ____
n. Phillip Carey	Yes ✓	No ____
o. Raybestos Manhatten	Yes ✓	No ____
p. Unarco	Yes ✓	No ____

If you answered "No" to this Question in regard to all non-party defendants, proceed to Question 11. If you answered "No" to this Question in regard to any non-party defendant, go to Questions 10 and 12 and strike that defendant's name from the list at each. If you answered "Yes" in regard to any defendant, proceed to Question 10.

10. Did the exposure to any of the asbestos-containing products of non-party defendants cause Peter Pulizzi's mesothelioma?

a. Anchor Packing	Yes ✓	No _____
b. Armstrong World Indus. Inc.	Yes ✓	No _____
~~c. Combusion Engineering, Inc.~~	~~Yes _____~~	~~No _____~~
d. Eagle-Pitcher	Yes ✓	No _____
e. Flexitallic	Yes ✓	No _____
f. GAF Corporation	Yes ✓	No _____
g. Garlock	Yes ✓	No _____
h. Johns-Mansville	Yes ✓	No _____
i. Kentile	Yes ✓	No _____
j. Keasbey & Madison	Yes ✓	No _____
~~k. Lorillard Corporation~~	~~Yes _____~~	~~No _____~~
~~l. Nicolet~~	~~Yes _____~~	~~No _____~~
m. Owens-Illinois, Inc.	Yes ✓	No _____
n. Phillip Carey	Yes ✓	No _____
o. Raybestos Manhatten,	Yes ✓	No _____
p. Unarco	Yes ✓	No _____

If you answered "No" to this Question as to all non-party defendants, proceed to Question 11. If you answered "No" to this Question in regard to any non-party defendant, go to Question 12 and strike that defendant's name from the list. Proceed to Question 11.

11. Did any negligence of the United States Navy (Brooklyn Navy Yard) proximately cause his mesothelioma?

Yes ✓ No _____

If you answered "No" to this Question strike the name of this nonparty defendant from the list at Question 12. Proceed to Question 12.

12. Determine the percentage which represents the relative share of the responsibility of each direct defendant and non-party defendant arising out of Peter Pulizzi's mesothelioma. The total must be 100%. Do not assign a percentage to any company whose name has been crossed out in accordance with these instructions.

a. Fibreboard Corporation	7.5%
b. Keene Corporation	7.5%
c. Anchor Packing	3%
d. Armstrong World Indus, Inc.	2%
e. Combusion Engineering, Inc.	0%
f. Eagle-Pitcher	10%
g. Flexitallic	1%
h. GAF Corporation	4%
i. Garlock	2%
j. Johns-Mansville	15%
k. Kentile	1%
l. Keasbey & Madison	5%
m. Lorillard	0%
n. Nicolet	0%
o. Owens-Illinois, Inc.	10%
p. Phillip Carey	10%
q. Raybestos Manhatten	6%
r. Unarco	6%
s. United States (Brooklyn Navy Yard)	10%
Total	100%

13. Was the conduct of any of the following defendants in reckless disregard for the safety of others? Do not consider a company whose name has been crossed out in accordance with these instructions.

a) Fibreboard Yes ✓ No _____

b) Keene Corporation Yes ✓ No _____

14. Did any of the following defendants act knowingly and in concert to cause the acts upon which liability is based? Do not consider a company whose name has been crossed out in accordance with these instructions.

a) Fibreboard Yes ✓ No _____

b) Keene Corporation Yes ✓ No _____

STOP: Sign the form and advise the Marshal that you have reached a verdict.

JEFFREY [ILLEGIBLE]
Foreperson

APPENDIX E

Carl D'Andrilli
1375 Merry Ave.
Bronx, N.Y. 10461
1-(718) 82387

Honorable Robert W. Sweet
U.S. Court House
Foley Square, room 2202
New York, N.Y. 10007.

Dear Judge Sweet,

I was a juror on the asbestos death and injury case involving Tabolt, Consorti, Luchnick and Pulizzi versus various defendants and many non-party defendants. The case ended July 24, 1993.

I'm writing to inform you, that on Friday July 23rd and Saturday July 24th, Mrs Georgia Arnold, another juror, stated than John's Manville, a non-party defendant possesses a one billion dollar fund to pay lawyer's fees to fight asbestos litigation cases. She made these remarks to the jury while we were deliberating monetary awards in the Consorti and Pulizzi cases. She also mentioned this "fund" one other time, a few days before deliberations began.

I didn't know if this was general "knowledge that a well-informed person could possess while serving as a juror dealing with well-publicized matters; or if it was improper. Although, I was somewhat troubled, I decided, perhaps wrongly, not to immediately inform you.

After the completion of the case on Saturday, jurors and lawyers were engaged in conversation, outside the courtroom and later in front of the building. A lawyer commented to me that Mrs. Arnold had remarked that she was disappointed that the award wasn't larger. He asked me how much higher she desired to go. I answered probably much higher since she believed John's Manville was spending one billion to fight

cases. The lawyers told me they considered this an important piece of information.

On Tuesday July 27 and Wednesday July 28, Mr Silbert called me in an attempt to persuade me to sign a statement regarding the John's Manville one billon "lawyer fund" remark, I declined to do so.

However, the lawyers reaction combined with my earlier discomfort over this remark, convinced me that I should you of this situation.

I called you chambers in hopes of making an appointment to personally inform you. I was told on Wed. July 27 that you were on vacation. I then decided on this letter

In closing, I would like to apologize for any difficulty that any poor judgment on my part may have caused or will cause the court, jurors, parties.

Sincerely,

/s/ CARL D'ANDRILLI

SWEET, District Judge.

The defendants Fibreboard Corporation, Owens-Corning Fiberglas Corporation, Atlas Turner, Inc., Porter Hayden Company, and the Flintkote Company (collectively, the "Defendants"), have moved by order to show cause pursuant to Rule 3(j) of the Civil Rules of the Southern District of New York ("Rule 3(j)") seeking leave to reargue certain issues addressed in this Court's opinion in this matter filed on January 21, 1994, and reported at 847 F.Supp. 1086 (S.D.N.Y.1994) (the "January 21 Opinion"). For the following reasons, this motion is granted in part and denied in part.

Facts, Parties, and Prior Proceedings

The facts, parties, and prior proceedings in these cases have been fully recounted in prior opinions of this Court, familiarity with which is assumed. *See, e.g., In re New York Asbestos Litigation,* 847 F.Supp. 1086 (S.D.N.Y.1994); *In re New York Asbestos Litig.,* 149 F.R.D. 490 (S.D.N.Y.1993); *In re New York Asbestos Litig.,* 145 F.R.D. 644 (S.D.N.Y.1993).

After 25 days of trial, Special Verdicts were rendered in this case seriatim on July 22, 23, and 24, 1993, and on August 19, 1993, certain motions were filed seeking discovery with respect to judgment molding. Post trial motions pursuant to Rule 50(b) of the Federal Rules of Civil Procedure were made September 14. These motions and issues related to judgment molding were addressed in the January 21 Opinion. This motion was considered fully submitted as of February 9, 1994.

Standard for Motion to Reargue Under Rule 3(j)

Rule 3(j) provides in pertinent part: "[t]here shall be served with [a] notice of motion [for reargument] a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked." The standards controlling a motion for reargument pursuant to Rule 3(j) and a motion to amend the judgment pursuant to Rule 59(e), Fed.R.Civ.P., are the same. *See Morser v. AT & T Info.*

Sys., 715 F.Supp. 516, 517 (S.D.N.Y.1989); *Lotze v. Hoke*, 654 F.Supp. 605, 607 (E.D.N.Y.1987). Thus, to be entitled to reargument under Rule 3(j), the Defendants must demonstrate that the Court overlooked controlling decisions or factual matters that were put before the it on the underlying motion. *See Violette v. Armonk Assocs. L.P.*, 823 F.Supp. 224, 226 (S.D.N.Y.1993); *Morin v Trupin*, 823 F.Supp. 201, 205 (S.D.N.Y.1993); *East Coast Novelty Co. v. City of New York*, 141 F.R.D. 245, 245 (S.D.N.Y.1992).

Rule 3(j) is to be narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the court. *See Caleb & Co. v. E.I. Du Pont De Nemours & Co.*, 624 F.Supp. 747, 748 (S.D.N.Y.1985). In deciding a Rule 3(j) motion, the court must not allow a party to use the motion to reargue as a substitute for appeal. *See Morser*, 715 F.Supp. at 517.

When the requisites of a Rule 3(j) motion—overlooked facts or caselaw—have not been met, a court may address the substance of the arguments raised in a Rule 3(j) motion to provide additional clarification of the issues sought to be reargued. This clarification serves to apprise the parties that, even if reargument were granted, it would be unavailing. *CMNY Capital, L.P. v. Deloitte & Touche*, 821 F.Supp. 152, 162 (S.D.N.Y. 1993); *Carolco Pictures, Inc. v. Sirota*, 700 F.Supp. 169, 170 (S.D.N.Y.1988).

Discussion

Pain and Suffering

The first issue raised by the Defendants relates to the denial of their motion to remit the awards for pain and suffering. The Second Circuit has stated that a court should remit a verdict only if it is so excessive as to shock the judicial conscience. *Petramale v. Local No. 17 of Laborers' Int'l Union*, 847 F.2d 1009, 1012 (2d Cir.1988). In deciding whether to remit the awards for pain and suffering in this case, the January 21 Opinion noted that, if remittitur were to be contemplated at all, reduction of the verdict could be perrnitted only so far as

the "maximum amount that would be upheld . . . as not excessive" and not a penny less. The Court further noted that, in determining whether an award "shocked" the judicial conscience, it was appropriate to refer to awards in other actions of a similar character. January 21 Opinion at *14.[1]

In determining whether the awards in the present case "shocked" the judicial conscience, the Court considered a number of factors, among them the opinion of Judge Sifton *In re Joint E. & S. Dists. Asbestos Litig.*, 798 F.Supp. 925, 938 (E.D.N.Y.1992) ("McPadden"), *rev'd on other grounds*, 995 F.2d 343 (2d Cir.), *and rev'd on other grounds*, 995 F.2d 346 (2d Cir.1993). Martin McPadden, the plaintiff in that case, died of mesothelioma, the disease afflicting the plaintiffs in the present cases. Judge Sifton has had extensive experience trying asbestos-related cases, and reference to his conclusions on remittitur in *McPadden* was appropriate.

The January 21 Opinion noted that, in *McPadden*, Judge Sifton found that no remittitur was required for an award of $4,500,000 for pain and suffering caused by mesothelioma of 11 month's duration, which meant that McPadden was awarded $409,090.91 per month of pain and suffering. After reviewing the extensive pain and suffering experienced by the Plaintiffs in the present actions, the January 21 Opinion concluded that the amounts awarded to these plaintiffs for pain and suffering were not so disparate from that accepted by Judge Sifton in *McPadden* as to shock the judicial conscience. Remittitur was, therefore, denied. January 21 Opinion at *14-17.

The January 21 Opinion noted that, in reaching his conclusions in McPadden, Judge Sifton referred to the fact that Justice Freedman of the New York Supreme Court, who also has extensive experience trying asbestos-related cases, had "allowed several multimillion dollar awards for pain and suffering in the state court's Brooklyn Navy Yard consolidation." January 21 Opinion at *6 (citing *McPadden*, 798 F.Supp. at

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[1] In this opinion, all citations to specific pages of the January 21 Opinion will refer to the pagination as available in the following manner: "January 21 Opinion at ___."

938). The January 21 Opinion concluded that Justice Freedman no longer felt constrained by the factors which she found applicable to the remittitur of pain and suffering awards in *Didner v. Keene Corp.*, Index No. 27373/89, N.Y.Sup.Ct. (Dec. 17, 1990), *reported in* N.Y.L.J., January 4, 1991, at 22 col. 2. *See* January 21 Opinion at *14.

The Defendants claim on the present motion that, in the Brooklyn Navy Yard cases, Justice Freedman did apply the standards enunciated in *Didner,* and that therefore the January 21 Opinion's conclusions regarding remittitur were in error.

Initially, the Court did not "overlook" the Brooklyn Navy Yard consolidation cases, nor is a decision of the New York Supreme Court "controlling" on this Court within the terms of Rule 3(j). The Defendants have not, therefore, met the standard for reargument under the Rule.

Even if reargument were granted on this issue, it would be unavailing. In *Didner,* Justice Freedman considered a number of factors, including awards in other cases, the severity of suffering, and the length of time that the plaintiff suffered, to reduce an award for mesothelioma of twenty-seven months' duration from $3,250,000 to $2,300,000. Converting this to a monthly rate for purposes of comparison, Justice Freedman approved an award of $85,185.19 per month for the mesothelioma-related pain and suffering in *Didner.*

The January 21 Opinion concluded that Justice Freedman did not feel constrained by the amounts determined in *Didner,* and in the state Brooklyn Navy Yard consolidation, she approved several awards for mesothelioma-related pain and suffering at a higher monthly rate than that which she approved in *Didner.*[2] Justice Freedman does not, therefore, regard the amount awarded in *Didner* as a permanent ceiling on such awards.

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[2] *See In re New York City Asbestos Litigation*, Index No. 40.000/88 (May 31, 1991) (award for Emanuel Cohen: $88.235.29 per month; award for Harry Greenberg: $200,000 per month; award for Lawrence Gold: $111,111.11 per month; award for Eugene Kuliberda: $142,857.14 per month; award for John Lipari: $150,000 per month; award for Luciano Lopez: $85,714.29 per month; award for Biagio Russo: $125,000.00 per month).

The decision whether to remit an award for pain and suffering can never be reduced to the application of a predetermined monthly rate. As was stated in the January 21 Opinion, "[t]he conscience of the courts must not remain fixed in time but must rather retain the capacity for change based on the experience of others and the determinations made in particular cases." January 21 Opinion at *16. Judge Sifton, after a careful consideration of McPadden's circumstances, and with reference to Justice Freedman's awards in the Brooklyn Navy Yard consolidation, concluded that an award of $409,090.91 per month for mesothelioma-related pain and suffering did not shock the judicial conscience. The January 21 Opinion, after consideration of the circumstances of the plaintiffs before the Court and with reference to Judge Sifton's conclusions in *McPadden*, concluded that the awards for pain and suffering in the present cases likewise do not shock this judicial conscience.

While Justice Freedman continues to apply the reasoning that she applied in *Didner*, the amounts awarded in *Didner* do not represent a fixed ceiling for pain and suffering awards in mesothelioma cases. If the January 21 Opinion was ambiguous in that regard, it has now been clarified, thus obviating reargument of the January 21 Opinion.

Further, in considering the question of remittitur in the *Consorti* case, the January 21 Opinion states that:

> The standards discussed above, when applied to the awards made by the jury for pain and suffering, indicate the jury's finding was consistent with those considered by Judge Sifton and the conclusions here previously reached, as is the award for the loss of past consortium.

January 21 Opinion at *42.

The Defendants point out that the January 21 Opinion applied the remittitur standards considered by Judge Sifton in *McPadden* to the awards of pain and suffering, and the remittitur standards enunciated by Justice Freedman in *Didner* to the awards for loss of consortium in *Tabolt* and in *Luchnick*.

As an initial matter, the Defendants, by referring to the explicit discussion of Mrs. Consorti's award for past con-

sortium, have not referred to any facts or case law overlooked by the Court in the January 21 Opinion, and therefore fail to meet the Rule 3(j) standard, although clarification may be in order.

The January 21 Opinion stated that the pain and suffering awards in *Consorti* were consistent with those considered by Judge Sifton and the conclusions previously reached. The Opimon stated that the award for the loss of past consortium was also consistent with the conclusions previously reached. The Opinion could be said to be ambiguous in that the sentence quoted above could appear to indicate that the Court had found Mrs. Consorti's loss of consortium award to be consistent with *McPadden* rather than *Didner,* but that was not the Court's intent. This exercise to abbreviate an opinion which turned out to be one hundred pages in length may seem to be ambiguous, but does not result in a ground for reargument.

Similarly, the Defendants seek to reargue the issue of remittitur of the award for loss of consortium to Mrs. Pulizzi. The January 21 Opinion addressed the issues specific to each plaintiff in the order that the verdicts were rendered. The *Pulizzi* case was, therefore, addressed last. The extensive discussions of the issues with respect to the first three verdicts had addressed most of the issues raised by the defendants in *Pulizzi,* and therefore the January 21 Opinion stated that "[t]he determinations set forth above dispose of the issues raised with respect to Pulizzi, whose case was comparable to Luchnick's except for the cigarette defense and an excessive loss of consortium award." January 21 Opinion at *49.

By this, the Court attempted to convey concisely that the conclusions reached with regard to *Luchnick* should control with regard to *Pulizzi* save for the two exceptions noted. In *Luchnick,* the Court found that the damages for loss of consortium awarded to Mrs. Luchnick were excessive, and remitted them according to the considerations espoused by Justice Freedman in *Didner.* By stating that *Pulizzi* should be considered similar to *Luchnick* "except for the . . . excessive loss of consortium award," the January 21 Opinion indicated

that the Court found no excessive loss of consortium award in *Pulizzi*. While this appeared clear to the writer of the Opinion at the time, it has evidently caused some confusion on the part of the *Pulizzi* defendants, which has now been rectified.

In addition to the syntax-based claims, the Defendants raise the substantive concern that, in failing to remit Mrs. Consorti's and Mrs. Pulizzi's damages for past loss of consortium, the January 21 Opinion was inconsistent both internally, and with the *Didner* standards that it purported to apply.

Mrs. Pulizzi's loss of consortium lasted 34 months, for which the jury awarded her $2,700,000. Mrs. Consorti's past loss of consortium lasted for 23 months, for which she was awarded $2,000,000. Mrs. Tabolt's past loss of consortium lasted for 18 months, for which the jury awarded her $3,750,000. In other words, the jury awarded Mrs. Tabolt $1,050,000 more than they awarded Mrs. Pulizzi for loss of consortium of 16 months shorter duration. In addition, the jury awarded Mrs. Tabolt $1,750,000 more than they awarded Mrs. Consorti for loss of consortium of five months' shorter duration. Mrs. Luchnick's past loss of consortium lasted for less than 11 months, for which the jury awarded her $1,400,000.

In order to achieve internal consistency, taking into consideration the duration of these damages as well as other characteristics specific to each plaintiff, Mrs. Tabolt's past loss of consortium award was remitted to $1,500,000 and Mrs. Luchnick's award for past loss of consortium was remitted to $500,000.

The awards in this case are also not in conflict with *Didner*. As noted in the January 21 Opinion, Judge Sifton did not refer to Justice Freedman's Brooklyn Navy Yard cases in reaching his conclusions with regard to remittitur of the loss of consortium awards in *McPadden*. The Court therefore applied the reasoning espoused by Justice Freedman directly in the present cases, rather than applying that reasoning as interpreted by Judge Sifton, as was done with regard to the awards for pain and suffering. January 21 Opinion at *7.

In *Didner,* Justice Freedman remitted an award for loss of consortium based on a consideration of intangible components of the "real injury done to the marital relationship." Utilizing the reasoning applied in *Didner* does necessarily result in an exact congruence between the awards in that case and those allowed in the present case. Considering the intangible elements discussed by Justice Freedman, the awards for past loss of consortium in *Consorti* and *Pulizzi* do not shock the judicial conscience, and are internally consistent with the awards in *Luchnick* and *Tabolt.*

The next ground for reargument raised by the Defendants relates to the fact that the Court set aside the jury's response to question 5(h) of the Special Verdict Form ("Question 5(h)") used in the trial of the *Consorti* case pursuant to Fed.R.Civ.P. 59, as being so strongly against the weight of the evidence as to constitute a seriously erroneous result. In answering Question 5(h), the jury had implicitly found that Consorti's life expectancy with mesothelioma was 26.2 years. The jury had heard testimony during the trial that Consorti's life expectancy without mesothelioma was 26.2 years, and there was no evidence upon which the jury could have found that his life expectancy was unchanged with mesothelioma *See* January 21 Opinion *42.

The Defendants assert that the answer to Question 5(h) was irreconcilable with the answer to question 5(a) on the same form relating to Mr. Consorti's damages for pain and suffering, a fact which was discussed at length in the January 21 Opinion at *37-42. They claim that this fact requires a retrial of both the issue of Mrs. Consorti's damages for future loss of consortium and of the issue of Mr. Consorti's pain and suffering.

The Defendants point to no facts overlooked in the January 21 Opinion. Far from referring to any controlling opinions the Court may have overlooked, they direct the Court to the Opinions cited in the January 21 Opinion with regard to an inconsistency in the answers on the Special Verdict Form used in the *Tabolt* trial. The Defendants have, therefore, clearly failed to meet the standard for reargument under Rule 3(j).

The cases referred to by the Defendants, which are discussed at length in the January 21 Opinion, stand for the proposition that, when a jury's inconsistent answers on a special verdict form cannot be harmonized, a court may not simply disregard one answer in order to eliminate the inconsistency. *See, e.g., Brooks v. Brattleboro Mem. Hosp.*, 958 F.2d 525, 529 (2d Cir.1992); *Finnegan v. Fountain*, 915 F.2d 817, 821 (2d Cir.1990); *Auwood v. Harry Brandt Booking Office, Inc.;* 850 F.2d 884, 891 (2d Cir.1988); *Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629, 645 (2d Cir.1986); *Bernardini v. Rederi A/B Saturnus*, 512 F.2d 660, 662 (2d Cir.1975).

The January 21 Opinion was cognizant of this legal proposition and, in fact, applied it in the *Tabolt* case. *See* January 21 Opinion at *10. In the *Consorti* case, however, the Court did not disregard an answer in order to eliminate the inconsistency on the Special Verdict Form. Under Fed.R.Civ.P. 59, a new trial may be granted on all or part of the issues if the verdict of the jury is so strongly against the weight of the evidence that it may be characterized as a "seriously erroneous result." *Hygh* v. *Jacobs*, 961 F.2d 359, 365 (2d Cir.1992); *Smith v. Lighhtning Bolt Prods., Inc.*, 861 F.2d 363, 370 (2d Cir.1988); *Flynn v. Goldman, Sachs & Co.*, 836 F.Supp. 152 (S.D.N.Y. Nov. 8, 1993). The jury's answer to Question 5(h) was set aside on the basis of this Rule. After setting aside this finding, there was no remaining inconsistency, and no reason to disturb the jury's findings further.

In *Gallick v. Baltimore & O.R.R. Co.*, 372 U.S. 108, 119-20, 83 S.Ct. 659, 665-66, 9 L.Ed.2d 618 (1963), the Supreme Court held that, when confronted with seemingly inconsistent answers on a special verdict for form, a court is obligated to try to reconcile the jury's findings and should require a new trial only in the case of a fatal inconsistency.

This holding was interpreted in *Floyd v. Laws*, 929 F.2d 1390 (9th Cir.1991). In *Floyd*, the court used a special verdict form in a case brought under 42 U.S.C. § 1983 and state tort law causes of action. Question 13 of the Special Verdict Forrn ("Question 13") asked whether the plaintiffs had been dam-

aged as a result of the defendants actions, to which the jury responded "No." After question 13 appeared the following instruction: "If your answer to question 13 is 'No,' do not answer any further questions." The jury disregarded this instruction and went on to answer question 14 on the special verdict form ("Question 14").

Question 14 asked what amount of money would compensate the plaintiff for the defendants actions, to which the jury responded $7,500 dollars. This answer appeared inconsistent with the answer to Question 13.

The Ninth Circuit held that, although a judge faced with seemingly inconsistent answers could not simply disregard one answer, the judge could disregard an answer that was given in contravention of the instructions on the special verdict form and was, therefore, mere surplusage. A trial court should defer only to legitimate or viable findings of fact. Since the answer to Question 14 was not a legitimate or viable finding of fact, it was proper for the trial judge to disregard it. Disregarding this answer eliminated its inconsistency with the answer to Question 13, and the court held that it was therefore proper to enter judgment on the basis of the answer to Question 13. *Floyd*, 929 F.2d at 1396-1400.

The answer to Question 5(h) on the *Consorti* special verdict form is similar to the answer to Question 14 in *Floyd*. Since the answer to Question 5(h) was so strongly against the weight of the evidence as to be characterized as a seriously erroneous result, it was not a legitimate or viable finding of fact, and was properly disregarded. Since disregarding the answer to Question 5(h) eliminated any inconsistency with the answer to Question 5(a), it was proper not to disturb the jury's answer to Question 5(a).

The Defendants next object to the fact that certain grounds for reducing the damages awarded in the present cases were not specifically addressed in the January 21 Opinion. In addition, they object that certain grounds for a new trial in *Tabolt*, which were briefed in their motions for a new trial, were not discussed in the January 21 Opinion.

"In a complex case with voluminous submissions, the Court cannot be expected to mention each and every argument and submission, however important one of the parties believes an item to be." *Market St. Ltd. Partners v. Englander Captial Corp.*, 1993 WL 276062, at *1, 1993 U.S. Dist. LEXIS 10002, at *3 (S.D.N.Y. July 21, 1993) (denying Rule 3(j) motion to reargue); *accord Woodward & Dickerson v. Kahn*, 1992 WL 349681, at *2-3, 1992 U.S. Dist. LEXIS 17032, at *6 (S.D.N.Y. Nov. 5, 1992) (same).

With regard to the grounds for reducing the damages awarded in these cases, the Defendants point to the fact that in his closing argument, Consorti's counsel asked the jury to award $36,000 for certain medical expenses. (Tr. at 4415.) The jury awarded $100,000 in past medical expenses.

The $36,000 referred to by the Defendants did not represent all of the medical bills that the Consortis had paid. The jury heard evidence that Mr. and Mrs. Consorti tried a series of experimental medical treatments for which they paid "30-something thousand." (Tr. at 1498.) In addition, the jury heard testimony that Consorti had gone to a clinic in Toronto, Canada for treatments that cost another $6,293.12, which was paid out of their own savings. (Tr. at 1506, Pl.'s Ex. 3.) The jury also heard testimony that the Consortis purchased a variety of items to attempt to improve Consorti's health or increase his comfort, such as vitamins and canes. (Tr. 1504-06.) The award of $100,000 for Consorti's pase medical bills was not without basis in the record.

The Defendants also object to the jury's award of $47,500 to Mrs. Consorti for future medical and funeral expenses, claiming that there was no evidence to support this award on the record.

The Court charged the jury in this matter that they could "award a sum of money for any reasonable medical expenses which . . . will be incurred in the future in treating Consorti, as well as the cost of funeral or burial if you conclude that he will die of mesothelioma." (Tr. at 4497.) There was no ques-

tion that Consorti's mesothelioma would prove fatal, and that therefore funeral expenses were appropriate.

The jury heard substantial testimony regarding Consorti's past medical expenses, and found that his life expectancy with mesothelioma was nine months. The jury heard testimony that Mrs. Consorti had been administering an experimental treatment, "714 X serum," to her husband at night. This treatment cost $150 dollars per vial. (Tr. at 1497.) If Mrs. Consorti continued this treatment until Mr. Consorti's anticipated death, this cost alone would account for a significant portion of the $47,500 challenged by the Defendants. In addition, the Consortis were supplied with the implements necessary to continue the treatment that Mr. Consorti received at a clinic in Toronto at home. (Tr. at 1505.) As discussed above, the past costs for this treatment amounted to over $6,000 dollars. It was reasonable for the jury to infer that, if this treatment was continued, the Consortis would incur additional costs. The testimony on past medical expenses, plus the knowledge that Consorti would not improve and would soon require burial, provided a basis from which they could infer Consorti's future medical and funeral expenses.

The Defendants also contend that the jury's awards for loss of services, both past and future, to Mrs. Luchnick and Mrs. Pulizzi were higher than the amounts requested by plaintiffs' counsel. They also object to the fact that, although the plaintiffs' counsel requested damages for Mrs. Luchnick for a period of 9.9 years into the future, the jury awarded damages for 19 years into the future.

The jury was instructed that, in determining damages for loss of services, they should "appraise in an impartial manner to the best of [their] ability, a pecuniary or money value of each decedent's services to his widow on the day he died," (Tr. at 4491), taking into consideration such things as the decedent's character, habits and ability; the circumstances and condition of his wife; and the services he would have performed for his wife.

The jury was also instructed that Mrs. Luchnick was 64 and Mr. Luchnick was 73 at the time of his death, and, according to the mortality tables, Mr. Luchnick had a life expectancy of 83 years. With regard to the mortality tables, the jury was instructed that they are "nothing but statistical averages. They . . . are not binding upon you, but they can be considered, together with your own experience and with the evidence which you've have heard about each one of the decedents' health, and habits and employment and activities." (Tr. at 4493.)

The jury heard extensive testimony regarding the nature of the plaintiffs and their relationships with their spouses. The amount of damages found by a jury is not limited to the relief requested by the plaintiff. *Roorda v. American Oil Co.*, 446 F.Supp. 939, 948 (W.D.N.Y.1978) (allowing amendment of pleading to increase alleged damages since this would not have limited jury in any case). The amount awarded to Mrs. Luchnick and Mrs. Pulizzi for lost services are within the bounds of the province of the jury.

Each of the grounds for a new trial in *Tabolt* was considered and rejected, rather than overlooked, by the Court.[3] The Defendants' motion to regargue as to these issues is therefore denied.

The Defendants have directed the Court to one ground for reduction of the damages assessed against them, addressed in their briefs, which was overlooked in the January 21 Opinion. Reargument is appropriate where a court overlooks grounds for relief that were briefed in the underlying motion. *Heurtey v. Brichmont & Assoc.*, 1992 WL 54362, at *2, 1992 U.S. Dist. LEXIS 2348; at *6 (S.D.N.Y. March 4, 1992). Rule 3(j) provides that there shall be no oral argument on a motion to reargue unless the Court grants the motion and specifically

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[3] These grounds include: the submission of the case to the jury on a design defect theory; the wording of the verdict form and the admission of certain evidence regarding Flintkote's allegedly reckess conduct; the evidentiary basis for the jury's finding that Flintkote acted in concert; the perjudical effect of plaintiff's failure to disclose

directs that the matter shall be reargued orally. No oral argument is required in this case.

On the Special Verdict form used in *Pulizzi*, the jury was asked to state the economic damages arising out of Pulizzi's death with respect to his funeral expenses. The funeral bill in *Pulizzi* of $2,925 was in evidence, but the jury awarded $10,000 for this item of damages. There was no basis in the record for this award, and therefore the award of $10,000 for Pulizzi's funeral expenses shall be reduced to $2,925.

Conclusion

For the reasons discussed above, the Defendants' motion to reargue is denied except with respect to the award for Pulizzi's funeral expenses. The Defendants' motion to reargued is granted with respect to this element of damages, and the award for Pulizzi's funeral expenses is reduced from $10,000 to $2,925.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 94-7501
Filed January 29, 1996

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of January, one thousand nine hundred and ninety-six.

CONSORTI

Plaintiffs-Appellees

—v.—

ARMSTRONG WORLD

Defendant-Appellants

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Armstrong World Industries, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular

active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: BETH J. MEADOR
Beth J. Meador,
Administrative Attorney

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1133—August Term, 1994

(Argued: March 8, 1995 Decided: September 12, 1995)

Docket No. 94-7823

WILLIAM GASPERINI,

Plaintiff-Appellee,

—v.—

THE CENTER FOR HUMANITIES, INC.,
doing business as Guidance Associates,

Defendant-Appellant.

Before:

MAHONEY, WALKER, and CALABRESI,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*), after a jury trial, awarding damages

against defendant-appellant Center for Humanities, Inc., in the amount of $450,000 for the loss of 300 slide transparencies belonging to plaintiff-appellee William Gasperini.

Reversed and remanded for a new trial on the issue of damages unless Gasperini agrees to remit all damages in excess of $100,000.

FRANCIS A. MONTBACH, New York, NY (Bigham Englar Jones & Houston, New York, NY, on the brief), *for Appellant Center for Humanities, Inc.*

SAMUEL A. ABADY, New York, NY (Jonathan S. Abady, David N. Mair, Rubin, Kalnick, Bailin, Ortoli & Abady, P.C., New York, NY, on the brief), *for Appellee William Gasperini.*

CALABRESI, *Circuit Judge*:

Although we usually think of photography as creating a permanent record, its permanence is tenuous at best. This is particularly so in the case of slide transparencies, the medium in which most professional photographers work. Duplication of the original transparency is difficult and necessarily involves a significant loss of quality. As a result, commercially viable prints can in most cases only be made from the original transparency. And once an original slide transparency is lost, the ability to

make commercially usable prints is also lost, leaving behind only those prints that had already been made. This reality lends a certain urgency to transactions involving the use of original transparencies.

In this case, plaintiff-appellee William Gasperini, a journalist, provided some three hundred slides to the defendant-appellant Center for the Humanities ("the Center"), slides which the Center subsequently lost. The Center conceded liability for the lost transparencies, and a jury trial on the issue of damages was held before the United States District Court for the Southern District of New York (Brieant, *J.*). The jury returned an award of damages for Gasperini in the amount of $450,000. Because we conclude that this award is excessive under New York law (the applicable law in this diversity case), a new trial will be required unless Gasperini agrees to a remittitur and accepts an award of $100,000.

I. BACKGROUND

William Gasperini is a well-regarded journalist for CBS News and the Christian Science Monitor. Since he began his journalism career in 1984 in Central America, Gasperini has earned his living primarily in the radio and print media, although, on occasion, he has also sold photographs. Gasperini's earnings from photography, by his estimation, total just over $10,000 for the period from 1984 through 1993.

In 1990, Gasperini entered into a contract with the Center, under which Gasperini agreed to supply the Center with original color transparencies that he took in Central America between 1984 and 1990. Gasperini delivered 300 transparencies to the Center; he claimed that his mother produced an additional ten transparencies

at a later date. The Center used the transparencies in the preparation of an educational videotape titled *Conflict in Central America*. Gasperini was to be paid a royalty of fifteen percent of the cash receipts from the sale of the videotape. It was understood that the Center would return the original transparencies to Gasperini when work on the videotape was completed. But when the time came, and despite an extensive search, the Center could not locate the transparencies.

Gasperini brought this diversity action in the District Court for the Southern District of New York. The Center admitted liability, and the issue of damages was tried to a jury in June 1994. At the trial, Gasperini presented evidence, largely through expert witness Jane Kinne, that an "industry standard" within the photographic publishing community valued lost transparencies at $1,500 each. Following a three day trial, the jury returned a verdict awarding Gasperini damages of $450,000, which, according to the jury foreman, represented $1,500 each for 300 transparencies. The Center moved for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. The district court denied the motion without comment, and this appeal followed.

II. DISCUSSION

Because the jury returned a damage award equal to the so-called industry standard of $1,500 per lost transparency, the Center focuses its argument on the propriety of allowing the jury to hear evidence about that standard. According to the Center, in the absence of an explicit agreement to pay the so-called industry standard as liquidated damages in the event transparencies are lost, no industry standard exists under New York law.

Because there was no liquidated damages agreement in this case, the Center contends that it was error to deny the Center's motion *in limine* and to allow the jury to hear evidence about an industry standard.

The Center is correct that the Appellate Division of the New York Supreme Court has on two occasions refused to recognize an industry standard as, by itself, determinative of value. *See Nierenberg v. Wursteria, Inc.*, 189 A.D.2d 571, 571-72, 592 N.Y.S.2d 27, 28 (1st Dep't), *leave to appeal denied*, 82 N.Y.2d 651, 601 N.Y.S.2d 581 (1993); *Alen MacWeeney, Inc. v. Esquire Assocs.*, 176 A.D.2d 217, 218, 574 N.Y.S.2d 340, 341 (1st Dep't 1991), *leave to appeal dismissed*, 79 N.Y.2d 1015, 584 N.Y.S.2d 437 (1992). But the Appellate Division has not unequivocally rejected the relevance of evidence of an industry standard when such evidence is combined with other proofs. Rather, the court has concluded: "This record, as well as case law, makes it clear that no such standard exists, without, *inter alia*, a consideration of the uniqueness of the subject matter of the slides and the earning level of the photographer." *MacWeeney*, 176 A.D.2d at 218, 574 N.Y.S.2d at 341; *see also Nierenberg*, 189 A.D.2d at 572, 592 N.Y.S.2d at 28 (quoting *MacWeeney*). From the references to the "record" in these decisions, it is apparent that the New York courts view the existence of an industry standard as, at least in part, a question of fact, subject to proof at trial. Accordingly, the district court did not err in allowing the jury to hear evidence about an industry standard.

That said, the jury's award cannot stand. As we have noted, New York law, in setting damages for lost transparencies, requires a consideration of (1) the uniqueness of the transparencies and (2) the earning level of the photographer. *Blackman v. Michael Friedman Publish-*

ing Group, 201 A.D.2d 328, 328, 607 N.Y.S.2d 43, 44 (1st Dep't 1994); *Nierenberg*, 189 A.D.2d at 572, 592 N.Y.S.2d at 28; *MacWeeney*, 176 A.D.2d at 218, 574 N.Y.S.2d at 341. And Gasperini failed to make a showing on either point sufficient to sustain the jury's verdict.

Without question, some of the transparencies were unique: as Gasperini described them, they depicted combat situations in which Gasperini was the only photographer present. But Gasperini also testified that on numerous occasions other able, professional photographers were present, sometimes in large numbers, when he took photographs that were among the three hundred lost. Although we accept the proposition that each photographer brings his or her own skills, judgment, and perspective to a particular scene, leading to some variation between photographs of a single event, no reasonable jury could have concluded, as the jury in this case did, that each of the lost three hundred transparencies was equally, and significantly, original.

Gasperini's earning record as a photographer further undercuts the jury verdict. The only evidence presented on this point was that the commercial use of Gasperini's photographs yielded income of slightly more than $10,000 over the ten year period from 1984 through 1993; in no year did he earn more than $3,720.40. For all his skills as a photographer, Gasperini did not earn his living with his camera, and there was no evidence presented that he would do so in the future. Gasperini did testify that he had intended to produce a book about his experiences in Central America, a project that he claims is now doomed to failure by the loss of the three hundred transparencies. But there was no evidence presented that Gasperini had found, or would have been

able to find, a publisher for such a work, much less that the volume would have earned him significant income.

Given the New York requirement that we consider the uniqueness of the lost transparencies and the earning level of the photographer, rather than relying solely on the so-called industry standard, the testimony of Jane Kinne, Gasperini's expert on the valuation of photographs, is of little utility. Ms. Kinne did testify that, in her opinion, the lost transparencies should be valued at $1,500 each. Her explanation for this valuation, however, said a lot about the alleged industry standard and virtually nothing about either uniqueness or earning level. Ms. Kinne explained the value she gave to the transparencies as follows: a transparency taken by a professional photographer and selected in a professional edit is, under the industry standard, worth $1,500; Gasperini is a professional photographer whose work has been professionally edited; therefore, the value of each of the lost transparencies is $1,500. Thus, under Ms. Kinne's approach, a common photograph of the President exiting a helicopter (culled from a number of such shots), taken by an inexperienced but published photojournalist, would have the same value as a classic image taken by a photographer with the reputation of Walker Evans or Alfred Eisenstaedt. New York law does not countenance such a methodology.

The object of tort damages is to do what can be done to make an injured party whole; it is not meant to be a winning lottery ticket. In light of Gasperini's failure to make an effective showing that all 300 lost transparencies were unique, and the strong evidence of Gasperini's limited earning power as a photographer, the jury's award of $450,000 cannot be regarded as anything but a financial windfall for Gasperini.

A review of New York cases involving lost transparencies further supports the conclusion that the jury's award in this case was excessive. *See Consorti v. Armstrong World Indus.*, No. 94-7501, slip op. at 6713 (when New York substantive law governs a diversity case, we look to New York decisions for guidance on the issue of excessiveness of damages). We acknowledge the limited utility of comparing damage awards in different cases, particularly since we find ourselves without access to the full records in the prior cases. *See id.* at 6716. Nevertheless, there is a clear pattern in appellate decisions addressing awards of damages for lost transparencies, and that pattern is instructive.

The Appellate Division has considered such damage awards on four occasions in the last six years. Only once did the court permit an award of $1,500 per lost transparency. *Girard Studio Group v. Young & Rubicam, Inc.*, 147 A.D.2d 357, 357, 536 N.Y.S.2d 790, 790 (1st Dep't 1989). In *Girard*, the court made no reference to the purported industry standard, but instead valued transparencies that "represented classics from a long career." *MacWeeney*, 176 A.D.2d at 218, 574 N.Y.S.2d at 341. In each of the other three cases, the Appellate Division reduced the award of damages to well under $1,500 per transparency. In *Nierenberg v. Wursteria, Inc.*, the court noted that, while there was evidence of the lost transparencies' uniqueness, that evidence was offset by the fact that the plaintiff earned little from still photography. It therefore rejected the application of the purported industry standard and reduced the damage award to $500 per transparency. 189 A.D.2d at 571-72, 592 N.Y.S.2d at 28. In *Blackman v. Michael Friedman Publishing Group*, where the record contained evidence of the photographer's earning power but no evidence of uniqueness, the

court reduced a damage award from $1,000 per transparency to $400 per transparency. 201 A.D.2d at 328, 607 N.Y.S.2d at 44. And in *Alen MacWeeney, Inc. v. Esquire Associates*, despite evidence that the plaintiff was a successful photographer who earned $265,000 in the year of the loss, the court reduced a damage award from the claimed industry standard of $1,500 per transparency to less than $159 per transparency—a total of $30,000 for 189 transparencies—because of the generic nature of the transparencies' subject matter. 176 A.D.2d at 218, 574 N.Y.S.2d at 341.

Gasperini cites a number of unpublished New York trial court awards applying the claimed industry standard of $1,500 per lost transparency. But these cases are inapposite for three reasons. First, our role in a diversity case in which the state's highest court has not spoken on an issue is to attempt to discern how that court would decide the issue. *See O'Neill v. City of Auburn*, 23 F.3d 685, 689-90 (2d Cir. 1994); *Plummer v. Lederle Lab.*, 819 F.2d 349, 355 (2d Cir.), *cert. denied*, 484 U.S. 898 (1987). And we believe that published decisions of the Appellate Division are generally far better predictors of how the New York Court of Appeals would decide a question of state law than even a fair number of unpublished proceedings in the trial courts. Second, several of the unpublished decisions that Gasperini cites predate the Appellate Division's decisions in *MacWeeney* and *Nierenberg*; to the extent that the opinions are in conflict, the Appellate Division of course controls. And finally, as the district court noted, the bulk of the unpublished decisions are in cases that involved provisions under which the defendants expressly agreed to pay $1,500 in liquidated damages for any lost transparency. No such provision exists in this case.

New York law provides that, in a case where a jury returns an itemized verdict, as the jury did in this case, the Appellate Division "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995). This standard accords less deference to the jury's award than does the traditional standard, under which the jury's award is to be upset only if it is so excessive as to shock the conscience of the court. *Consorti*, slip op. at 6712-13, 6717; *see also Matthews v. CTI Container Transp. Int'l*, 871 F.2d 270, 278 (2d Cir. 1989) (stating the traditional standard). This being a diversity case, we are bound to follow the standard set forth in the New York statute. *Consorti*, slip op. at 6713.

Applying this standard, we conclude that the jury's award of $450,000 to Gasperini materially deviates from what is reasonable compensation. As we have said, where there is some evidence of uniqueness but no evidence of significant earnings, the New York courts have determined that damages above approximately $500 per lost transparency are excessive. *Nierenberg*, 189 A.D.2d at 571-72, 592 N.Y.S.2d at 28. And where evidence of substantial earnings is offset by the absence of evidence of uniqueness, the courts have reduced damages awards to between $159 and $400 per lost transparency. *Blackman*, 201 A.D.2d at 328, 607 N.Y.S.2d at 44; *MacWeeney*, 176 A.D.2d at 217-18, 574 N.Y.S.2d at 341. In this case, Gasperini presented plausible evidence that some of his photographs were highly unique. Giving Gasperini every benefit of the doubt, there may have been as many as fifty such slides. The remaining photographs, however, were not unique; rather, they depicted either generic scenes or events at which other

professional photojournalists were present. And, although Gasperini is a respected journalist whose contacts in the news industry may boost his prospects as a photographer, he has no established record of significant earnings from the commercial use of his photographs.

Drawing all reasonable inferences in favor of Gasperini, we conclude that the jury could have awarded damages of up to $1,500 per transparency for the transparencies as to which there was plausible evidence of significant uniqueness. As to the remaining transparencies, however, in light of Gasperini's limited earnings and the lack of uniqueness, any damage award of more than $100 per transparency would be excessive. Accordingly, we conclude that any award totalling more than $100,000 would exceed reasonable compensation.

Remittitur always presents difficult problems for appellate courts. We review the evidence on a cold paper record, and we compare that record to prior decisions as to which we have only an incomplete knowledge of the facts. This case is particularly difficult, since neither we nor the jury was able to see the lost transparencies themselves. In the end, it is not our job to impose a specific award of damages—that task is for the jury. We do, however, have the obligation to patrol the outer bounds of what damages a jury may reasonably award, and to offer a choice between remittitur and a new trial when those bounds have been exceeded. *See Vasbinder v. Scott*, 976 F.2d 118, 122 (2d Cir. 1992); *Phelan v. Local 305 of the United Ass'n of Journeymen, & Apprentices of the Plumbing & Pipefitting Indus. of the United States & Can.*, 973 F.2d 1050, 1064 (2d Cir. 1992). Accordingly, we will set aside the jury's verdict of $450,000, and will order a new trial unless Gasperini acquiesces to an award of $100,000.

Supreme Court, U.S.
FILED
APR 30 1996

(2)

No. 95-1339

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOHN CONSORTI & FRANCES CONSORTI,

Petitioners,

v.

OWENS-CORNING FIBERGLAS CORP.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, for purposes of applying the *Erie* doctrine, a distinction exists between a state statute that imposes explicit monetary limits on damage awards in civil cases and a state statute that establishes substantive standards, other than explicit monetary limits, by which damage awards are to be limited?

2. Whether a federal court of appeals has failed to apply the traditional "abuse of discretion" standard of federal appellate review of a district court's denial of a Rule 59 motion where that court concludes, as a matter of law, that a damage award is excessive and orders remittitur of the excessive award to the maximum allowable legal limit.

LIST OF PARTIES AND RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, respondent Owens Corning Fiberglas Corporation states that it is a publicly held corporation, has no parent company and has the following non-wholly owned subsidiaries or affiliates:

Amiantit Fiberglas Industries, Ltd.
Arabian Fiberglas Insulation Company
Asahi Fiber Glass Company, Ltd.
Fiberglas Colombia, S.A.
Scandinavian Glasfiber AB
Vitro-Fibras, S.A.

All parties to the appeal in the Second Circuit are listed in the caption of the petition.

TABLE OF CONTENTS

Page

I. COUNTER-STATEMENT OF THE CASE 1

A. The District Court's Opinion 2

B. The Court of Appeals' Opinion 3

II. NONE OF THE FOUR QUESTIONS PRESENTED MERITS REVIEW BY THIS COURT 6

A. Question 1 7

B. Question 2 11

C. Question 3 12

D. Question 4 15

III. CONCLUSION 15

TABLE OF AUTHORITIES

CASES:

City of Springfield v. *Kibbe*, 480 U.S. 257 (1987) 10

Davis v. *Omitowoju*, 883 F.2d 1155 (3d Cir. 1989) 11

Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938) 3

Gasperini v. *The Center for Humanities, Inc.*, No. 95-719 (argued April 16, 1996) 1

Inya v. *Hyundai, Inc.*, 209 A.D.2d 1015, 619 N.Y.S.2d 440 (4th Dep't 1994) 6

Markman v. *Westview Instruments, Inc.*, No. 95-26 (Apr. 23, 1996) 11

In re New York Asbestos Litigation, 847 F. Supp. 1086 (S.D.N.Y. 1994) 2

Patton v. *TIC United Corp.*, 77 F.3d 1235 (10th Cir. 1996)..11

Salve Regina College v. *Russell*, 499 U.S. 225 (1991) 8

Taylor v. *Freeland & Kronz*, 112 S. Ct. 1644 (1992) 10

United States v. *Williams*, 112 S. Ct. 1735 (1992) 10

CONSTITUTION:

Due Process Clause, Amend. XIV ..... *passim*

Seventh Amendment..... *passim*

STATUTES:

N.Y. Civ. Prac. L. & R. §5501(c)
(McKinney Supp. 1995) .....*passim*

RESPONDENT'S BRIEF IN OPPOSITION

The sole basis upon which petitioners seek review of the judgment of the Second Circuit in this case is that it assertedly presents the same issues that are presently before the Court in *Gasperini* v. *The Center for Humanities, Inc.*, No. 95-719 (argued April 16, 1996). Under any reasonable reading of the Second Circuit's opinion in this case, however, this case presents *none* of the questions raised in *Gasperini*. Thus, rather than holding this petition for its decision in *Gasperini*, the Court should deny this petition forthwith.

I. COUNTER-STATEMENT OF THE CASE

In this personal injury tort action governed by New York substantive law, the jury returned a verdict against respondent exceeding $20 million, including a total of $12 million for non-economic damages for the pain and suffering endured by petitioner John Consorti after he contracted mesothelioma. The federal district court, sitting in diversity, declined to disturb this verdict. On appeal, the Second Circuit, as is plain from that court's opinion, applied New York's substantive standard of material deviation from reasonable compensation as set forth in N. Y. Civ. Prac. L. & R. § 5501(c)(McKinney Supp. 1995) and, as a matter of New York law, determined that the historic range of damages for pain and suffering under that New York legal standard is between $1 million and $3 million in all asbestos personal injury cases involving mesothelioma tried under New York law. Accordingly, the Second Circuit ordered a remittitur of the verdict to $3.5 million unless petitioners agreed to undergo a new trial. In

reaching this decision, the Second Circuit did not "review," in either a constitutional or a non-constitutional sense, any "fact" tendered to or determined by the jury in this case. Because its decision and application of a pure point of law disposed of this case, the complex questions raised by the Second Circuit's decision in *Gasperini* are not present in this case.

A. The District Court's Opinion

After verdict, Owens Corning moved, *inter alia*, for a new trial or a remittitur based upon the excessiveness of the verdict. In denying Owens Corning's post-trial motions, the district court did not indicate whether it believed that its review of the size of the verdict was controlled by § 5501(c). That statute does not permit a verdict for compensatory damages to "deviate[] materially from . . . reasonable compensation."[1] *See In re New York*

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[1] On its face, § 5501(c) applies only to courts of the Appellate Division; this may explain the silence of the district court as to the applicability of § 5501(c) to its review of Owens Corning's claim of excessiveness. It is, however, settled that New York trial courts are to apply the "reasonable compensation" standard in reviewing verdicts challenged as excessive at the post-trial stage of cases. *See, e.g., Inya* v. *Hyundai, Inc.*, 209 A.D.2d 1015, 619 N.Y.S.2d 440 (4th Dep't 1994). Owens Corning notes that the substantive standard set forth in § 5501(c) is not merely an effort by the New York legislature to prohibit "unreasonable" compensation. Rather, it is a standard by which courts can and must determine, in the absence of any more particularized guidelines from the New York legislature, the permissible *range* of compensatory damages that may be

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Asbestos Litigation, 847 F. Supp. 1086, 1102-07 (S.D.N.Y. 1994).

B. The Court of Appeals' Opinion

The Second Circuit began its analysis of the question whether the $12 million verdict for pain and suffering is excessive by making clear, at the outset, hat it was not second-guessing in any way the facts as necessarily found by the jury regarding either the quantity or quality of the pain and suffering petitioner John Consorti endured prior to his death. The court explained that its ultimate finding of excessiveness "in no way deprecates the enormous suffering that John Consorti endured." Pet. App. at 13a, 72 F.3d at 1009. The court continued:

> We take it as given that reasonable people of his age, in good mental and physical health, would not have traded one-quarter of his suffering for a hundred million dollars, much less twelve.

Pet. App. at 14a, 72 F.3d at 1009.

Turning to consideration of the $12 million verdict obtained by petitioner John Consorti, the Second Circuit articulated the first of the three questions it would

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awarded in particular cases and classes of cases and then apply that standard to particular cases.

ultimately decide in response to Owens Corning's excessiveness claim:

> The first step in deciding whether the award of $12 million for John Consorti's pain and suffering is excessive must be to ascertain whether federal or state rules apply.

Pet. App. at 18a, 72 F.3d at 1010. After reviewing various pertinent cases in the lower courts and this Court decided since *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), the Second Circuit concluded that the question "how much money John Consorti may be awarded . . . is an issue of substantive rights under the laws of New York." Pet. App. at 20a, 72 F.3d at 1011. The court's analysis is straightforward.

First, the court pointed out that if New York had, by statute, placed a specific dollar limit on the amount of damages recoverable in civil actions such as the case at bar, "federal courts ruling in diversity would unquestionably be bound by those substantive rules." *Id.* The court next observed that, while § 5501(c) does not place precise dollar limits on compensatory damage awards, that statute nevertheless prescribes "the substantive rule provided by New York law."[2] Under *Erie*, this substantive standard

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[2] As discussed below, the petitioner in *Gasperini* has attempted to persuade the Court that a material distinction can be drawn under *Erie* between a state statute setting a specific numerical "cap" on compensatory damages available in particular civil actions and a statute which, like § 5501(c), establishes substantive standards for determining the

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necessarily displaces the "shocks the conscience" standard that a federal district court would otherwise employ in determining whether a verdict in an action governed by federal law is so excessive as to warrant a new trial or a remittitur. Pet. App. at 20a, 72 F.3d at 1011-12.

Having determined that the New York substantive standard set forth in § 5501(c) governs this case, the Second Circuit addressed the second question before it: the content of that substantive standard in the context of asbestos personal injury actions involving substantial suffering and pain from mesothelioma. Pet. App. at 24a-28a, 72 F.3d at 1013-15. The court's analysis involved a comparison between the verdict in this case and a broad base of verdicts in similar cases tried under New York law. The court's analysis did not depend upon its evaluation, let alone rejection, of the evidence of petitioner John Consorti's pain and suffering. Based on its extensive analysis, the court concluded as follows:

> Given the consistent pattern, over a considerable number of cases of death by mesothelioma, of reduction of jury verdicts for pain and suffering by New York courts to figures ranging from approximately $1 million to a maximum of $3 million, we

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excessiveness of verdicts without setting precise dollar limits or ranges. Owens Corning respectfully submits that the proffered distinction is frivolous, particularly where, as here, application of the state standard involves nothing more than an examination of jury verdicts in analogous cases without any consideration of disputed factual issues.

> conclude an award exceeding $3.5 million would deviate materially from what is deemed reasonable under New York law.

Pet. App. at 29a, 72 F.3d at 1015.

Having decided this question of New York substantive law, the answer to the third question addressed by the Second Circuit--application of that law to this case--was subsumed within and controlled by the court's answer to the second question. Without reference to any of the facts of the case at bar other than its total acceptance of the propositions that petitioner John Consorti had endured substantial pain and suffering and that his pain and suffering was comparable to that experienced by other victims of mesothelioma, the court "direct[ed] entry of a conditional order of a new trial on the issue of damages for pain and suffering, unless [petitioners] accept remittitur to" $3.5 million. Pet. App. at 29a, 72 F.3d at 1015-16.

II. NONE OF THE FOUR QUESTIONS PRESENTED MERITS REVIEW BY THIS COURT

Petitioners do not seek review of the question of New York law that effectively controlled the Second Circuit's disposition of their case--that any verdict for pain and suffering in an asbestos personal injury case involving extensive suffering from mesothelioma may not exceed $3.5 million because a verdict greater than $3.5 million would violate the "reasonable compensation" standard of § 5501(c). That is, of course, a question of state law that this Court would have no interest in reviewing in any event. Owens Corning's point, however, is that in reaching

this conclusion, the Second Circuit decided a *pure* question of state law that did not depend for its resolution, or its application to the $12 million verdict here, on the Second Circuit's "re-examination" of any "facts" as implicitly or expressly found by the jury in the case at bar. Under these circumstances, none of the questions presented by petitioners warrants review because this case, as decided by the Second Circuit, simply does not present those questions for review. Owens Corning will discuss each of petitioners' four "Questions Presented" in light of this crucial factor that is not necessarily present in *Gasperini*.

A. Question 1[3]

Where the Court has granted plenary review of a question presented by a case and another case subsequently comes on the Court's docket that properly presents that same question, the Court's usual practice is to hold the second case for its decision in the first case and then to dispose of the second case as appropriate in light of its decision in the first case. In their Question 1, petitioners vaguely assert that their case presents "the identical issue" on which this Court granted review in *Gasperini*. The petitioner in *Gasperini* presented three questions on which the Court granted review:

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3 "1. Where this Court has already granted certiorari in the case of *Gasperini* v. *The Center for Humanities, Inc.*, 66 F.3d 427 (2d Cir. 1995), *cert. granted*, No. 95-719, __ S.Ct. ___ (1996) WL 18430, 64 USLW 3349 (U.S., Jan. 19, 1996), on the identical issue, should this Court not grant certiorari in the present case?"

1. Should a federal appellate court exercising diversity jurisdiction apply a federal or state standard of review to the appeal of a district court's denial of a Rule 59 motion to set aside a jury award as excessive?

2. Absent trial error, does the Seventh Amendment's "reexamination clause" permit federal appellate review of facts found by a jury?

3. If federal appellate review of jury fact findings is permitted at all by the Seventh Amendment, what is the standard of review?

Although petitioners here attempt to persuade the Court that their case raises at least one question "identical" to one of the three questions before the Court in *Gasperini*, that attempt must fail because their case does not in fact present any of the three questions raised in *Gasperini*.

Although the analysis and nomenclature employed by the *Gasperini* petitioner are somewhat confusing, the gist of his position is that the Re-examination Clause of the Seventh Amendment limits the power of federal appellate courts to review or "re-examine" "facts" found by a jury, including "facts" determined by a jury in conjunction with its decision as to the appropriate amount of damages to award a plaintiff. According to the *Gasperini* petitioner, federal appellate review of a trial court's grant or denial of a motion for a new trial on the ground of an excessive verdict allows the appellate court to overturn the trial

court's refusal to grant a new trial as an "abuse of discretion" only if "there is no support in the evidence" for the amount of damages selected by the jury. Br. for Petitioner in No. 95-719 at 43.[4]

However the *Gasperini* petitioner's argument is understood, it is manifest that the *Gasperini* petitioner does not challenge the power of a federal district court to review "facts" found by a jury. Br. for Petitioner in No. 95-719 at 38 (motion for new trial on excessiveness ground may be adjudicated by federal district court consistently with Seventh Amendment). Perhaps more important, the *Gasperini* petitioner concedes that in a diversity case, a federal district court is to "evaluate the evidence of damages according to the factors provided by state law," Reply Br. for Petitioner in No. 95-719 at 3. Given this concession, Question 1 raised by the *Gasperini* petitioner does not directly challenge the proposition that, under *Erie*, a federal appellate court reviewing the denial of a Rule 59 motion for a new trial based on the asserted excessiveness

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[4] The argument made by the *Gasperini* petitioner essentially converts "abuse of discretion" review into legal review because in the total absence of evidence to support a verdict, the appellant prevails as a matter of law without the necessity for the appellate court to "weigh" or otherwise evaluate any evidence that is in the record. Were the Court to conclude in *Gasperini* that the Re-examination Clause requires that extraordinary result–one that essentially abolishes "abuse of discretion" review, the Court's holding would not affect the outcome of this case for reasons set forth in the text below. It is *a fortiorari* that were the Court to reject this position of the *Gasperini* petitioner, the judgment of the Second Circuit in this case would have to stand.

of the verdict must also apply the New York standard of "reasonable compensation." Rather, the *Gasperini* petitioner's argument is that the Seventh Amendment's Re-examination Clause trumps *Erie* if, in applying New York's substantive standard, the federal appellate court must "re-examine" "facts" found by the jury.

Where, as here, the federal appellate court has interpreted and applied the New York standard without weighing or "re-examining" *any* "fact" found by the jury, this Court's anticipated answer to Question 1 raised by the *Gasperini* petitioner is of no consequence to the outcome. This is so because even if the Court agrees with the *Gasperini* petitioner that, as a general matter, rulings on Rule 59 motions implicating "facts" are to be reviewed by federal appellate courts for abuse of discretion, that conclusion of the Court would do nothing to prohibit *de novo* appellate review of a pure issue of law that is dispositive of the federal appellate court's review of an appeal seeking to overturn the denial of a Rule 59 motion by a federal district court. In short, if a Rule 59 motion is erroneously denied because the federal district court makes a mistake of law, review of that error of law is *de novo* and does not even implicate the Seventh Amendment.

B. Question 2[5]

On its face, this question asks whether the Second Circuit in this case was required to review the district court's refusal to grant a new trial as an "abuse of discretion" rather than *de novo*. Petitioners' analysis of an answer to this question, however, assumes that the review conducted by the Second Circuit of the excessiveness issue involved something other than a pure question of law upon which direct *de novo* federal appellate review would otherwise be entirely proper.[6] But, and as previously

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5 "2. Did the Second Circuit err by applying a state and not federal standard of appellate review to determine whether a jury award in a diversity action was excessive, in direct conflict with this Court's decisions in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989), and *Donovan* v. *Penn Shipping Co.*, 429 U.S. 648 (1977)?"

6 As noted above, it may be that the district court in this case failed to apply the New York substantive standard established by § 5501(c) and that it might arguably have been appropriate for the Second Circuit to have remanded this case to the district court with directions to determine the content of the New York standard and to apply that standard to this case in the first instance. Where, however, a federal court of appeals reaches out to decide a pure issue of state (or federal) law not decided by a district court, there is no insult done to the proper functioning of the district court, and judicial efficiency may, as here, often be the by-product. Because petitioners here do not challenge the Second Circuit's decision that New York law prohibits an award of damages for pain and suffering greater than $3.5 million in this type of case, there would be no point to sending this

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discussed, the review conducted by the Second Circuit here involved decision of a pure question of law. The court of appeals determined the content of the New York substantive standard and applied that legal standard to this case without weighing any evidence or second-guessing any factual or quasi-factual determination made either by the jury or the district court. The court of appeals thus determined that the district court's denial of Owens Corning's Rule 59 motion had to be reversed on a point of law, not on the basis of insufficiency of the evidence at trial or any other defect in that evidence. That is precisely the role carved out for federal appellate courts in the determination of issues of state law by this Court's decision in *Salve Regina College* v. *Russell*, 499 U.S. 225 (1991). The Second Circuit's faithful performance of this role, the substantive result of which is not challenged by petitioners in this Court, is not a matter that is worthy of this Court's attention.

C. Question 3[7]

Question 3 essentially restates Question 2 as raising an intra-circuit conflict with other decisions of the Second

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case back to the district court to apply the New York law as already determined by the court of appeals.

[7] "3. In this asbestos-related diversity action involving the jury's award of damages for Mr. Consorti's torturous and unremitting pain and suffering from mesothelioma over a 32-month period, upheld by the District Court, did the Second Circuit err by applying a state standard, and not the federal standard, of appellate review to determine whether the jury's award was excessive, in direct conflict with its own prior holdings, as well as the holdings of other circuits?"

Circuit and a broad inter-circuit conflict among the various federal circuits. None of the federal appellate cases petitioners invoke, however, involved a situation in which a court of appeals applied a substantive state law limitation on the size of a compensatory damage award and did so as a matter of law without "reviewing" *any* fact found by the jury. As Owens Corning argues above, *see* note 2 *supra*, there is no conceivable distinction under *Erie* between a state statute setting fixed limits on compensatory (or punitive) damage awards and a statute, such as § 5501(c), that provides less precise but no less substantive limitations on damage verdicts. Unless this Court would hold to the contrary, the relevant federal appellate decisions are those in which the federal courts of appeals have uniformly enforced state statutory caps on damage awards.[8] There is

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[8] Although the constitutionality and applicability of state statutory damage "caps" in diversity cases have been litigated with some frequency, Owens Corning has not identified a single reported decision in which both the parties and the court did not assume the applicability of the state "cap" as a matter beyond any possible dispute under *Erie*. *See, e.g.*, *Patton* v. *TIC United Corp.*, 77 F.3d 1235 (10th Cir. 1996). The absence of any such reported case is not surprising because there is no plausible argument that *Erie* would not bind a federal court to apply the state "cap" unless the "cap" were otherwise unconstitutional. In *Davis* v. *Omitowoju*, 883 F.2d 1155 (3d Cir. 1989), the Third Circuit rejected a Seventh Amendment challenge to the application of a numerical "cap," reasoning that the legislature's predetermination of that limit could have been imposed on the jury either pre-verdict (through a proper instruction) or post-verdict (through judicial review) and, thus, applying the "cap" at the post-verdict stage could not possibly run afoul of the Seventh Amendment as constituting review of a "fact" found by the jury. The Second Circuit's determination that

[Footnote continued on next page]

no inter-circuit conflict on this point, which is the point actually raised by the case at bar, nor is there any reasonable argument that a court of appeals could refuse to apply such state law standards to diversity cases.[9]

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§ 5501(c) is to be interpreted as setting a limit of $3.5 million on damages for pain and suffering in personal injury asbestos cases involving death by mesothelioma stands on no different constitutional footing.

9 In *Gasperini*, the Second Circuit appeared to consider the sufficiency of certain evidence adduced at trial to support the verdict as measured against the substantive standard established by § 5501(c). The petitioner in *Gasperini* appears to take the position in this Court that such application of controlling law to facts involves the direct review and displacement of "facts" found by the jury or, in the alternative, that such application involves a mixed question of law and fact the "review" of which is barred at the federal appellate (but not the trial) level by the Re-Examination Clause of the Seventh Amendment. It is not evident to Owens Corning why the application of law to facts by an appellate court should be regarded as the "review" of facts in a constitutional sense unless the court of appeals literally reverses a factual finding made by the jury and proceeds to redetermine that factual issue. However that may be, it is manifest in the case at bar that the Second Circuit did not "review" any factual finding of the jury, because its determination that New York law limits damage awards to $3.5 million in all cases similar to the case at bar was based on facts capable of judicial notice--*i.e.*, jury awards in other similar cases--not on disputed factual issues that were actually presented to the jury at the trial of the case at bar.

D. Question 4[10]

The Second Circuit's opinion makes no mention of the Seventh Amendment for the simple reason that that Amendment was never invoked by petitioners in the district court or the Second Circuit. Having failed even to invoke the Seventh Amendment in the courts below, petitioners may not now rely on that Amendment in this Court, nor would they be entitled to the benefits of any decision that might be rendered by the Court in *Gasperini* on the Seventh Amendment questions that would otherwise be favorable to petitioners. *See United States* v. *Williams*, 112 S. Ct. 1735, 1738-39 (1992); *City of Springfield* v. *Kibbe*, 480 U.S. 257, 258-59 (1987); *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992).

Even if, however, petitioners had invoked the Seventh Amendment in the courts below or the Second Circuit had, *sua sponte*, considered the impact of that Amendment on this case, the result would be the same because the Seventh Amendment does not stand as a bar to the grant of a new trial by a federal appellate court based on *legal* error.[11]

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10 "4. Does the Seventh Amendment permit a federal appellate court to overturn a jury award as excessive, particularly where the trial judge considered and rejected a post-trial claim of excessiveness under Fed. R. Civ. P. 59?"

11 There is no colorable argument that, under English common law as it stood in 1791, a jury would have played any role whatsoever in determining the appropriate range of recovery of damages in cases to be heard by other juries. Thus, it is

[Footnote continued on next page]

III. CONCLUSION

There being no basis upon which petitioners would be entitled to any relief no matter how this Court decides *Gasperini*, the petition should be denied.

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Respectfully submitted,

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clear from a long line of this Court's cases, most recently the Court's decision in *Markman* v. *Westview Instruments, Inc.*, No. 95-26 (Apr. 23, 1996), that the formulation of such a general damages rule and its application to a specific case do not implicate the Seventh Amendment.